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CONTENTS

	PAGE
Office of Administrative Procedure	75
Franks Committee	76
American Administrative Law Presented to the Franks Committee	78
Supreme Court—October 1955 Term	86
Procedure Act Cases	93
Other Federal Cases	99
State Cases	133
Chairman's Page	142

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OFFICE OF ADMINISTRATIVE PROCEDURE

In December of last year, Attorney General Brownell announced the establishment of a government-wide Office of Administrative Procedure in the Department of Justice. At the same time he announced that Mr. J. Smith Henley had been selected as the Director of the new office.

According to the Department of Justice release, duties of the Office will include study of the adequacy of existing procedures in the federal agencies for determining the rights, duties, and privileges of persons having business before the agencies. From these studies, the Office will attempt to assist the agencies in the formulation of rules and in the improvement of administrative procedures. Other duties will include the initiation of cooperation between agencies and their respective bars in developing and adopting, as far as practicable, uniform rules of practice and procedure.

As the official release puts it, "Operation of the office will be on an experimental basis for an initial period while experience indicates the extent of its usefulness. If expectations are fulfilled, appropriate provision will later be embodied in legislation and proposed for enactment by the Congress. It is felt that it is necessary through temporary arrangements to develop experience, thus laying the groundwork for later legislation since the office, while similar in some of its aspects to the Administrative Office of the Courts, has no precedent in the executive branch of the

Federal Government. The powers of the new office will be advisory only."

Establishment of an Office of Administrative Procedure is, of course, a measure that has been urged by administrative lawyers ever since the Report of the Attorney General's Committee on Administrative Procedure. It should be noted, however, that the new Office in the Department of Justice falls short in important respects of the kind of body advocated by the Attorney General's Committee and more recently by the Hoover Commission and the American Bar Association's own Special Committee on Legal Services and Procedure. The Office as set up does not rest upon statute, it is not an independent agency, and it possesses only advisory authority. In addition, it has no authority over hearing officers, something both the Attorney General's Committee and the Sellers Committee have urged such a body should possess. It remains to be seen whether a truncated agency, shorn of legal powers of substance, can really accomplish what advocates of an Administrative Procedure Office have hoped for.

FRANKS COMMITTEE

For those interested in administrative law, the London meeting later this year of the American Bar Association comes at a particularly appropriate time. During the latter part of 1955, a Committee on Administrative Tribunals and Enquiries was appointed in Britain "to consider and make recommendations on: (a) The constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a minister's functions. (b) The working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a minister on an appeal or as the result of objections or representations and in particular the procedure for the compulsory purchase of land." It is composed of the following members: Sir Oliver Franks (chairman) (well known to Americans as wartime Ambassador to this country), Lord Balfour of Burleigh, Mr. R. Bowen, Q. C., Mr. J. C. Burman, Dame Florence Hancock, Mr. D. Johnston, Q. C., Sir Geoffrey S. King, Lord Linlithgow, Major J. Morrison, Miss K. M. Oswald, Lord Justice Parker, Mr. H. Wentworth Pritchard, Mr. Charles Russell, Q. C., Lord Silkin, Mr. Alan Symons and Professor Kenneth Wheare. The secretary of the committee is Mr. J. Littlewood.

The appointment of the Franks Committee comes at a peculiarly opportune moment in English administrative law. It is now a quarter of a century since the Committee on Ministers' Powers made its famous pioneer study of delegated legislation and administrative justice. Yet, important though the work of that Committee has been to students of administrative law, it cannot be denied that all too many of its recommendations have never been given practical effect. At the same time, the years since the Committee on Ministers' Powers reported have seen a constant increase in administrative authority in Britain, culminating in the powers given to deal with the war emergency, as well as

those essential to perform the vastly increased functions assumed by the post-war State. The expansion of administrative power has been accompanied by increasing uneasiness among students of English administrative law, who have feared that the authority was not sufficiently safeguarded and might sometimes be put to arbitrary and biased use. In addition, there has more and more been articulated concern on the part of the public, expressed both in and outside the halls of Westminster. All that was needed was the catalyst of a *cause célèbre* and it was forthcoming in the now-notorious Crichel Down affair. Just as it was Lord Hewart's descent from Olympus in *The New Despotism* (1929) that caused the Lord Chancellor to set up the Committee on Ministers' Powers, so it was Crichel Down that led directly to the appointment in 1955 of the Franks Committee.

The Franks Committee has spent the past year in gathering the written and oral evidence upon which its report will be based. It finished this stage of its work at the end of 1956. Ahead of it, of course, is the actual writing of its report. If it can adhere to its present time schedule, this report will be published just before the London meeting of the Association. Thus, the journey of members of this Section to Britain will be made at a time when a climax is reached in recent concern with administrative law on the other side of the Atlantic. Though the Franks Committee itself is as yet hardly known outside Britain, its work could ultimately prove to be of basic importance to the administrative law of the common-law world, including that in this country.

It is perhaps typical of an English investigatory body like the Franks Committee that it has not limited its inquiry to its own country. Instead, it has sought to learn from other systems what they have developed that might usefully be imported into English law. Thus, the Committee invited a leading member of the *Conseil d'Etat* in France to give evidence before it. And the Editor of this Bulletin was given a similar invitation. In response to it, he sent to the Committee a lengthy written memorandum, focussing upon the recent American experience in administrative law and, on November 13, 1956, personally testified before the Committee in London. The giving of oral evidence was a particularly interesting experience. It involved over two hours of close questioning on the matters presented in the written memorandum. The session itself was a testimony both to the conscientious work of investigatory agencies in Britain and to the keenness of the Franks Committee's interest in developments on the western side of the Atlantic.

In his written memorandum, the Editor dealt with two principal subjects. The first was a summary of the recent American experience in the matters being considered by the Franks Committee. The second dealt with suggestions for improvement of the English law on the subject. It is felt that the first part of the memorandum should be of interest to readers of this Bulletin, as a convenient summary of the crucial administrative law issues in

this country. Also of interest should be the manner in which the relevant American experience was presented to a foreign audience. What follows, therefore, is the portion of the Editor's memorandum to the Franks Committee which dealt with American administrative law.

American Administrative Law Presented to Franks Committee

Administrative Procedure Act, 1946.— The law governing the procedure of administrative tribunals and agencies in the United States differs basically from that which prevails in the United Kingdom primarily because of the passage by the Federal Congress of the Administrative Procedure Act of 1946. The enactment of that statute was the culmination of a long and vigorous campaign by the organized legal profession in the United States to improve administrative procedure and, interestingly enough, that campaign was so successful in securing bi-partisan support for its objectives that the 1946 Act was passed without a dissenting vote in both Houses of the Congress. Though the contrary has often been asserted, the APA is far from a comprehensive code of fair administrative procedure. Instead, it lays down the general procedural principles which are to govern administrative exercises of powers of delegated legislation and adjudication. The fact that it is a general framework rather than a detailed code does not, however, mean that it is not of fundamental importance. Such importance results from three things: 1) The APA represents the first legislative attempt in the common-law world to state the essential principles of fair administrative procedure. The Congress, in enacting the law of 1946, mirrored the mood of discontent with the administrative process which existed in the United States among many of those subject to administrative authority. But, as the American Supreme Court aptly put it, the Congress expressed its mood not merely by oratory but by legislation. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 487 (1951). 2) And this means that the principles of fair procedure laid down in the APA are binding upon the federal administrative process as a whole. The 1946 Act is one whose provisions control the procedures of all the administrative tribunals and agencies whose decisions affect the person or property of private citizens. It is true that the draftsmen of the Act relied primarily upon the best pre-existing administrative practice. What is of basic importance, however, is that the Act, by stating the essentials of such practice in statutory form, in effect, imposes the best pre-1946 procedure upon all the federal departments and agencies. 3) Just as significant, in assessing the impact of the APA, is the fact that the Act, in some important respects, goes even beyond the most advanced pre-1946 procedure in any of the federal agencies. This is particularly true with regard to the crucial question of the administrative hearing officer which is at the heart of administrative procedure on both sides of the Atlantic.

The present writer would subscribe unqualifiedly to the conclusion of the recent study by the Inns of Court Conservative

and Unionist Society that the provisions of the American Act "are designed to rectify similar abuses and shortcomings to those which we have seen in our own administrative procedure; and they have additional value for us as being enacted within a society with similar traditions and problems to our own and in the context of a system of law of common origin." *Rule of Law* 26 (1955). Of the provisions of the 1946 statute referred to, the most significant are those which deal with the question of the administrative hearing officer, for it is that question which, as already indicated, is the basic one in the field of administrative procedure and it is upon its attempt to resolve it that the American Act turns. The question referred to arises out of the process of administrative hearing and decision that has become common on both sides of the Atlantic. For practical reasons, it has been impossible for Ministers themselves to preside at the public inquiries which may often be held before decisions are rendered by them. It is, as Lord Simonds has said, inconceivable for the Minister to sit and hold the inquiry, because his time does not admit. *185 Lords Deb. 5s., col. 1007.* The conduct of the inquiries and other public hearings held by Anglo-American administrative agencies has therefore, customarily been vested in subordinate officials. The typical case in Britain is, of course, that arising under the Acquisition of Land (Authorisation Procedure) Act, 1946, under which a public local inquiry is held before an inspector of the relevant Ministry, to permit those affected to present their views to the Minister. But, though the subordinate inspector (or examiner, as he is commonly called in the United States) has thus been given the task of presiding at the inquiry or other hearing, it has not been he who has had the power to decide the case. That task has been reserved for others higher in the administrative hierarchy. But it is precisely out of this dichotomisation of the functions of hearing and decision that the difficult problems of administrative procedure arise.

There is, in the first place, the problem of hearing officer personnel—*i.e.,* that of who the individuals are who conduct the inquiries and other hearings held by the administration, how they are appointed, and by whom they are controlled. Before the Administrative Procedure Act, these matters were entirely up to the particular administrative agencies and the hearing officers were thus clearly in what the highest American Court has termed a dependent status. *Ramspeck* v. *Trial Examiners Conf.,* 345 U. S. 128, 130 (1953). Under the Act of 1946, a fundamental change has been brought about. It establishes a semi-independent corps of hearing officers called examiners, who are to preside over cases not heard by the agency's heads themselves. Their appointment and tenure are placed under the control of the Civil Service Commission (an independent agency in the executive branch) with the object of enabling qualified examiners to be chosen and of permitting them to maintain the independence appropriate to the exercise of their hearing functions, by freeing them from direct control by the administrative agency in which they work. "The Administrative Procedure Act was designed to

give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be 'very nearly the equivalent of judges even though operating within the Federal system of administrative justice.' Agencies were stripped of power to remove examiners working with them. Henceforth removal could be effected only after hearings by the Civil Service Commission. That same Commission was empowered to prescribe an examiner's compensation independently of recommendations or ratings by the agency in which the examiner worked. And to deprive regulatory agencies of all power to pick particular examiners for particular cases, § 11 of the Act commanded that examiners be 'assigned to cases in rotation so far as practicable. * * *'" *Ramspeck* v. *Trial Examiners Conf.*, 345 U. S. 128, 144 (1953).

As of June 30, 1954, there were 278 examiners appointed under the Federal Administrative Procedure Act. They ranged in number from one in several agencies to 106 in the Interstate Commerce Commission (considered by many as the most important of the federal regulatory agencies). Their compensation ranged from $7,000 to $12,690, with all but nine of the examiners receiving over $9,000. This compared with a salary of $15,000 at that time for federal district judges (though the judges' salaries have since been substantially increased). Though not perhaps inadequate as compared with the pay received by other civil servants, the salary of the examiners is certainly not comparable to the amount that a successful practising attorney can earn and efforts are being made to have it increased. Almost all of the American examiners are members of the legal profession: of the 278 already referred to, only six were non-lawyers.

Closely related to the problem of hearing officer personnel is that of the powers conferred upon such officers. The examiners appointed under the American Administrative Procedure Act are given substantial powers at the administrative hearing and in the process of decision, and their position is thus far superior to that of the inspectors who preside at the public local inquiries which are common in administrative law in the United Kingdom. They are vested with authority to preside over the hearing analogous to that exercised by a trial judge in the American system. They are empowered to recommend decisions or to issue initial decisions, which become the decisions of the agency unless appealed. The intent of the Act here is to assimilate the roles of hearing and deciding officers within the agency to those of trial and appellate courts. All recommended or initial decisions of the examiners must be shown to the private parties who are permitted to file objections thereto. The problem of disclosure of the hearing officer's report, so controversial in Britain, is thus expressly resolved in favor of disclosure by the American Administrative Procedure Act.

So far as the conduct of the hearing itself is concerned, the American Act provides that the common-law rules of evidence do not prevail, but no administrative decision is to be rendered except "as supported by and in accordance with the reliable, proba-

tive, and substantial evidence." The rights of counsel and cross-examination are expressly preserved. The problem presented in cases like *Errington* v. *Minister of Health,* [1935] 1 K. B. 249 is dealt with by provision for the insulation of the hearing examiner. No such officer is to "consult any person or party upon any fact in issue except upon notice and opportunity for all parties to participate". Attempts by administrative officials to influence decisions in which they are interested are likewise precluded. And, finally, the administrative decision itself must be a reasoned one. It must include "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record".

Hoover Commission Report.—Despite the substantial safeguards afforded under the Federal Administrative Procedure Act, many American jurists have felt that administrative power is still not adequately controlled by law. Their view has recently been given official expression in the report on administrative law submitted in 1955 by the Commission on Organization of the Executive Branch of the Government—usually referred to as the Hoover Commission, after its chairman, former President Herbert Hoover. The Hoover Commission was set up under a law passed in 1953 to investigate the organization of the executive branch of the Federal Government. Of its twelve members, four were appointed by the President, and four each by the presiding officers of the two Houses of the Congress. The Commission operated through so-called "task forces", composed of eminent specialists, whose job it was to inquire into different fields specified by the Commission. Among these was a Task Force on Legal Services and Procedure, whose task it was to study and report on legal services and procedure in the executive branch of the Government. This Task Force was composed of leading judges, practising lawyers, and law professors; its chairman was a former Chief Justice of the Supreme Court of Missouri.

At its very first meeting, the Task Force on Legal Services and Procedure was told by Chairman Hoover: "you are free to undertake investigations and make recommendations on any subject in the legal fields, as far as the executive branch of the Government is concerned." Acting under this mandate, the Task Force made a thorough year-long study of the entire field of federal administrative law and submitted its conclusions in a 442 page Report to the Hoover Commission, which the latter submitted to the Congress, along with its own recommendations. The Task Force Report is so comprehensive that it would be impossible even to summarize all of its parts. An attempt will, however, be made here to present in manageable form those of the Task Force's recommendations on administrative procedure which will, it is felt, be of interest to this Committee:

1) The Administrative Procedure Act should be replaced by a more detailed prescription of administrative procedures to be called the "Administrative Code." The proposed new Code contains many important and far-reaching amendments to the present statute. "They include such mat-

ters as eliminating some of the existing exemptions in the 1946 act, strengthening the public information requirements, assuring more complete internal separation of powers, perfecting an intra-agency appeals' procedure, encouraging simplified procedures wherever practicable, and, in general, promoting fairer, more efficient, and hence more economical conduct of the regulatory responsibilities of the executive branch." *Task Force Report,* 23.

2) An Administrative Court of the United States should be established. This court would be vested with the original jurisdiction now exercised by administrative tribunals in the fields of trade regulation and taxation (the Hoover Commission itself recommended that the proposed court be vested also with the jurisdiction in the field of labor relations now exercised by the National Labor Relations Board—an important administrative tribunal). Though it was not proposed that the Administrative Court would have general jurisdiction over the judicial functions of administrative tribunals and agencies, it was hoped that, once it were established, the proposed court would provide an instrumentality to which, from time to time in the future, additional adjudicatory functions in special areas now within the competence of administrative tribunals might be transferred. "The Administrative Court thus would serve as an intermediate stage in the evolution of administrative adjudication and the transfer of judicial activities from the agencies to courts of general jurisdiction." *Commission Report,* 87.

3) Examiners under the Administrative Procedure Act should be replaced by hearing commissioners appointed by a chief hearing commissioner. The latter, appointed by the President by and with the advice and consent of the Senate, should be attached to the proposed administrative court. The tenure, status, compensation, and removal of commissioners should be fixed by law. They should be completely independent of the tribunals or agencies whose cases they hear. Under the Task Force's proposal, there would be two grades of hearing commissioners—the first to serve for eight year terms and to receive $12,000 per year, the second to serve during good behavior and to receive $14,000 per year (as compared to the $15,000 salary of federal district judges at the time this recommendation was made). The intent here seems to be to set up a more or less independent pool of hearing officers whose status is intended to approach that of federal trial judges.

4) The powers of hearing officers should be greatly strengthened, even beyond the authority given them by the Administrative Procedure Act. Such officers should prepare initial decisions in all cases, which are to be final in the absence of appeals to the agency heads. Where such appeals are had, the agency's reviewing power is to be limited much as is that of an appellate court. This is intended to complete the analogy between the roles of hearing and deciding officers and those of trial and appellate courts begun by the Administrative Procedure Act.

5) Administrative procedure should be further judicialized by requiring that administrative hearings should be governed,

to the extent practicable, by the rules of evidence applicable in civil nonjury cases in the federal district courts.

6) Internal separation of functions insulating those who hear and decide in the administrative process from those engaged in other work should be extended by eliminating all exceptions to such separation now in the Administrative Procedure Act; henceforth such separation is to extend even to the process of final decision by the heads of the department or agency.

7) In cases where no public inquiry or hearing is required, notice of proposed decisions must be given and opportunity for some review within the particular department or agency must be provided.

8) An Office of Legal Services and Procedure should be set up in the Department of Justice to assist agencies in simplifying, clarifying, and making uniform rules of substance and procedure; to insure agency compliance with public-information requirements; and to receive and investigate complaints regarding legal procedures. The intent here is to have created an agency vested with continuing supervision and responsibility over the subject of administrative procedure.

9) Congress should look into the feasibility of transferring to the courts certain judicial functions of administrative agencies, such as the imposition or remission of money penalties, the award of reparations, and the issuance of injunctive orders.

It is interesting to note that, though the Hoover Commission Task Force appeared to be given the authority to investigate only the subject of administrative procedure, it interpreted its authority as including the subject of judicial review of administrative action, on the theory that control by the courts was an essential factor in ensuring that adequate procedures are followed by the administration. The Task Force Report consequently fully covered the subject of judicial review and included the following important recommendations on the subject:

1) Exceptions to the availability of judicial review should be repealed.

2) A simplified, uniform system of review by petition should be provided for.

3) Administrative findings of fact should be set aside on review if "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

4) There should be full review by the courts of administrative applications of law to fact.

Generally speaking, these recommendations would, if adopted, make the scope of review of administrative determinations by the federal courts equivalent to the scope of review by the federal courts of appeals of decisions of the federal district courts.

The far-reaching recommendations of the Hoover Commission Task Force (most of which were concurred in by the Commission itself) are not unnaturally the subject of much controversy in the United States. It is to be expected that most of the administrative agencies themselves are opposing adoption of the recommendations, since it is their authority which

stands to be limited by such adoption. More significant is the Report filed early this year by a Special Committee appointed by the President of the American Bar Association to consider the recommendations of the Hoover Commission Task Force. That Committee, composed of leading practitioners in administrative law and other fields, has concurred in most of the important recommendations of the Task Force. At its meeting in February 1956, the House of Delegates of the American Bar Association (the legislative organ of that association), acting in accordance with the recommendations of its Special Committee, adopted a number of resolutions substantially endorsing the major recommendations of the Hoover Commission Task Force and urging their enactment in a "Code of Federal Administrative Procedure" which would replace the Administrative Procedure Act.

Conclusion.—In the opinion of the present writer, two conclusions can be drawn from the recent American experience just summarized which should be of particular interest to this Committee. There is, in the first place, no doubt that the predominant theme in American administrative procedure is the *judicialization* of the administrative process. Under the Administrative Procedure Act, the public hearings held by American tribunals and agencies are presided over by examiners who possess much of the independence and authority of trial judges. Not unnaturally, the hearings themselves tend to approach the form of proceedings in the courts. The trend toward judicialization is even more pronounced under the recommendations of the Hoover Commission and its Task Force. In certain fields, the jurisdiction of administrative tribunals would be transferred to an Administrative Court. In other cases, the hearing officers of the administration would be transformed into virtual judges, vested even with tenure during good behavior in many cases. These officers would have decision-making powers analogous in many ways to those of trial judges; their decisions would be subject only to appellate review by the heads of the departments or agencies in which they sit. The administrative hearings themselves would be governed, so far as practicable, by the court-room rules of evidence and review of administrative decisions would be treated as equivalent to review of trial courts by appellate courts. There is certainly in the American development, and particularly in the Hoover Commission proposals, a degree of judicialization of administrative procedure that is utterly foreign to English conceptions. It is not, of course, seriously suggested that this Committee recommend the wholesale importation of the American development. Still, it should be of moment for this Committee to note that, however far they may go in their Report in advocating further procedural safeguards, it is well-nigh impossible for them to recommend anything so extreme as what has actually already occurred in the United States.

The second conclusion to be drawn from the American experience is perhaps of more immediate significance for the work of this Committee. And this is the fact

that the procedural safeguards imposed by the Administrative Procedure Act have not, despite fears which were expressed to the contrary, really interfered with the effective functioning of the administrative process. As was aptly stated in the recent study of the Inns of Court Conservative and Unionist Society, "there is no evidence that the obligation to give the facts and reasoning which support a decision, or the practice of publishing an Inspector's Report, or any of the improvements enacted by the A. P. A. have stultified or even hindered effective government." *Rule of Law,* 27-28. It should be pointed out that, though many of the administrative agencies themselves strenuously opposed the enactment of the Administrative Procedure Act, opposition to that law has now all but disappeared. Indeed, in the ten years that have elapsed since the enactment of the 1946 Act the basic principles behind it have obtained well-nigh universal acceptance among students of administrative law, even from those who had formerly opposed such legislation. To Americans today, the Administrative Procedure Act states only the basic essentials of fair administrative procedure, as that concept is now conceived on the western side of the Atlantic. The Hoover Commission Report shows, in fact, that to many the Administrative Procedure Act is now so obvious and elementary that it must be substantially strengthened and expanded.

A word should be said finally of what may be termed the administrative-law climate in the United States today. Before the last war it was only those on the so-called "right" (accused by their opponents of being concerned only with property rights and really aiming their shafts at the substance, rather than the administrative machinery, of the New Deal legislation) who were articulate in their demands for controls over agency authority. Since the war, however, proposals for safeguards have evoked a bipartisan response all but inconceivable a generation ago. "Unless we make the requirements for administrative action strict and demanding," a member of the Supreme Court who is anything but noted for his hostility toward the administrative process—Douglas, J —asserted in 1951, "*expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York* v. *United States,* 342 U. S. 882, 884 (1951). Fifteen years ago, it would have been almost unthinkable for one of Mr. Justice Douglas' political convictions to direct such a warning against administrative expertness. The tremendous expansion in administrative authority caused by the war and postwar emergencies has led people on both sides of the political party-line boundary to realize the need for safeguards. Extremists on both sides have moved toward the middle, and, that being the case, most of the controversy engendered by extremism has not unnaturally tended to abate.

[Reprinted from *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Enquiries, Twenty-Second Day 1008-1014 (London: H. M. Stationery Office, 1956).*]

Exclusiveness of the Record.—A basic principle of our administrative law is that of exclusiveness of the record. Under it, the agency decision must be based exclusively upon materials contained in the public record which both sides know about and have a chance to rebut. More and more in recent years, however, adherence to this rudiment of administrative justice has given way in areas deemed to be affected by considerations of national security. Nor has the Supreme Court been quick to censure these deformities in agency procedure. On the contrary, where the point has been squarely presented to it, the Court has found means to rationalize these departures from the fundamentals of fair play. See, *e.g., United States* v. *Nugent,* 346 U. S. 1 (1953).

The most recent case of this type is *Jay* v. *Boyd,* 351 U. S. 345 (1956). It arose under the Immigration Act section which provides that the Attorney General "may in his discretion" suspend deportation of any deportable alien fulfilling certain statutory requirements relating to moral character, hardship, and period of residence in this country. If the Attorney General suspends deportation under that provision, he must file with Congress "a complete and detailed statement of the facts and pertinent provisions of law in the case," giving "the reasons for such suspension." It is true that there is, in these provisions, no specific requirement that the Attorney General hold a hearing before exercising the statutory power conferred upon him. On the other hand, it is clear, as the Chief Justice pointed out in dissent, that the Attorney General was not vested with a wholly unfettered discretion: "It was an administrative discretion calling for a report to Congress on the manner of its use." *Id.* at 361. The Attorney General himself recognized this, for he provided by regulation for hearings to be held in cases calling for the exercise of his power to suspend deportations and a hearing had in fact been held in the *Jay* case. But the hearing thus held did not comply fully with the basic requirements of a fair administrative hearing in our law, for the relevant regulation provided that the determination in particular cases of whether deportation should be suspended might "be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security."

In *Jay* v. *Boyd,* suspension of deportation had been denied on the basis of certain confidential information. On appeal to the courts, the alien urged that the regulation authorizing reliance upon such secret evidence was invalid; but the Supreme Court rejected this claim. To the majority, the statute was intended to give the Attorney General an uncontrolled discretion extending to procedural as well as to substantive questions in these cases. In such circumstances, said the Court, the exercise of administrative discretion could be based upon

confidential information where national security was deemed to require it.

The Court's approach is, however, the converse of that normally followed in our administrative law. Here there is a bending of the normal law to accommodate demands asserted in the name of security. If an agency provides by regulation for a hearing, the courts will normally hold it to the terms of the regulation. This means that the hearing held must be a real hearing, not one in which the adjective rights of the individual are ignored. The administrator is not in such a case, any more than where a statute demands a hearing, permitted to keep the word of promise to the ear and break it to the hope. As Justice Frankfurter expressed it in his dissent, if the Attorney General invokes the aid of administrative law by establishing an adversary procedure, he cannot then "defy the presuppositions of a fair hearing. * * * [H]e cannot shelter himself behind the appearance of legal procedure—a system of administrative law—and yet infuse it with a denial of what is basic to such a system." *Id.* at 372. The point was even more pithily put by the Chief Justice when he declared, "Such a hearing is not an administrative hearing in the American sense of the term. It is no hearing. * * * To me, this is not due process." *Id.* at 362.

To a student of administrative law, distortions of the law of agency procedure such as that countenanced by the Court in *Jay* v. *Boyd* are most disturbing. We have come in recent years to see that security, like the patriotism of Dr. Johnson, may also come to be the last refuge of a scoundrel; many are the things done in security's name in a time of tension that would not be tolerated at other times. It is one thing for the Court to defer to Congressional judgment in a period of "cold war" even though individual rights may be adversely affected. It is quite another for the Court itself to twist the statutory language to uphold unfair procedures, where the Congress has not made such restricted construction imperative.

Other Procedure Cases.—An unusual case involving assertion of the right to be heard is *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956). It involved FCC rules which provided that licenses for broadcasting stations would not be granted if the applicant, directly or indirectly, had an interest in other stations beyond a limited number. These rules were challenged by a broadcasting company which already had an interest in the maximum number specified. The company claimed that the Commission could not by a blanket rule determine in advance that all applicants having an interest in more than the permitted number of stations would be denied licenses. Instead, it was contended, the Commission had to determine on each individual application presented to it whether additional licenses to the particular applicant would be in the public interest; for otherwise an applicant could not be given the "full hearing" required by the Communications Act. The Court emphasized the importance of the hearing requirement, stating that it "means that every party shall have the right to present his case or defense by oral or documentary evidence,

to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * * Such a hearing is essential for wise and just application of the authority of administrative boards and agencies." *Id.* at 202. According to the Court, however, the hearing requirement in no way withdraws from the FCC the rule-making authority necessary for the orderly conduct of its business. The Commission can by rule determine in advance its policy on concentration of broadcasting ownership.

The only difficulty is that, no matter how we may try to close our eyes to the fact, the FCC rule *is* inconsistent in substance with the hearing requirement of the act. If an applicant owns more than the permitted interest in other stations, of what avail is the formality of a hearing on its application? Actually, as the Court concedes, a full hearing will not be necessary in such cases: "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." *Id.* at 205. But, if that is true, has not the Commission, in effect, by the mere exercise of its rule-making power, amended the Communications Act section requiring a full hearing in *all* application cases?

Another agency-procedure case is *Communist Party* v. *Subversive Activities Control Bd.,* 351 U. S. 115 (1956). In it, the SACB had directed the Communist Party to register under the Internal Security Act of 1950 as a "Communist-action" organization. It did so after extensive hearings, as required by the Act. The Party, in its review action, claimed (among other things) that the testimony of three of the witnesses for the Attorney General on which the Board relied was perjured. As this allegation was not denied by the Government, the Court had to assume its accuracy. And, that being the case, said the Court, the Board's action could not stand. Agency action cannot be grounded on a finding based in part upon testimony alleged without challenge to be perjured. The case must be remanded to the Board to be redetermined with the perjured testimony expunged from the record. Perhaps the most important part of the Court's decision is its unequivocal rejection of the Government's argument that the Board should be upheld because, even without the challenged testimony, there was ample evidence to support its decision. In the Court's view, "when uncontested challenge is made that a finding * * * was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample testimony to support the Board's findings." *Id.* at 124.

Subpoena Power.—United States v. *Minker,* 350 U. S. 179 (1956), illustrates once again the fact that agencies possess powers of subpoena only to the extent to which such powers are actually delegated to them. The Immigration Act empowers immigration officers to subpoena the attendance and testimony of witnesses in any immigration proceeding. The question at issue in this case was whether this section empowered an immigration officer to subpoena a naturalized citizen who was the

subject of an investigation by the Immigration Service, where the purpose of the investigation was to determine if good cause existed for the institution of denaturalization proceedings. The Court answered this question in the negative, holding that the term "witness" in the subpoena statute did not include a putative defendant in an investigation proceeding. It is interesting to note that the Court was led to its holding by a realization of the tremendous impact which the subpoena power may have as a practical matter and the consequent need to construe it as narrowly as possible. The Court recognized that the subpoena power is capable of oppressive use, particularly in investigations that constitute the first step in proceedings calculated to bring about denaturalization. Here, concludes the opinion, the Congress has not provided with sufficient clarity that the subpoena power extends over persons who are the subjects of denaturalization investigations. In view of the general approach to the subpoena power articulated by the Court, no such power is to be implied where the Congress has not been explicit. Few will disagree with the policy considerations that thus led the Court in *Minsker* to construe the agency power narrowly. One may wonder, however, whether the Court itself has given sufficient weight to those considerations in its recent decisions drastically expanding the scope of administrative investigatory authority.

Judicial Review: *Availability.*—The Supreme Court in 1956 has taken a liberal approach to the question of the availability of review. In the *Storer Broadcasting Co.* case, discussed above, p. 87, the Court, with Justices Harlan and Frankfurter dissenting, held that the FCC rules were reviewable at the suit of the instant petitioner. The process of rule making was complete; it was final agency action by which petitioner was aggrieved. If petitioner could not seek review, it must await action to its disadvantage under the rules. These regulations, said the Court, presently aggrieve a broadcasting company like petitioner. The rules now operate to control its business affairs. Actually, the Court's decision upholding the present standing of petitioner to sue was, despite the dissent, no more than a reaffirmation of, and the most recent in the line of cases following, *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407 (1942).

More noteworthy, though equally justifiable, is the Court's decision on the availability of review in *Frozen Food Express* v. *United States,* 351 U. S. 40 (1956). At issue was the reviewability of an ICC order listing commodities which the Commission found were within the agricultural exemption in the Interstate Commerce Act and also listing those products which were not within such exemption. Plaintiff seeking review of this order was a carrier transporting commodities which the Commission ruled were nonexempt but which plaintiff claimed were "agricultural commodities." The district court had held the order nonreviewable, asserting that it did not have immediate adverse effect upon plaintiff. The high bench disagreed. According to it, "The determination by the Commission that a commodity is not an

exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The order of the Commission warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. * * * The determination made by the Commission is not therefore abstract, theoretical, or academic. * * * The order * * * which classifies commodities as exempt or nonexempt is, [in fact], the basis for carriers in ordering and arranging their affairs." *Id.* at 43-4. It is true that the order does not, in form command the carrier to do or to refrain from doing anything. It is, however, settled that effect, not form, is the test of reviewability. The Court recognized that the ICC order was in substance a "declaratory" one, such as is authorized under section 5(d) of the Administrative Procedure Act and clearly subject to immediate review.

Review of Public Interest.—Modern administrative law is characterized by enabling legislation delegating powers in the broadest terms. Such statutes are aptly characterized as "skeleton" legislation; in them, the flesh and the blood—not to mention the soul—of the legislative schemes are left entirely to administrative discretion. A common type of standard in such a statute is the "public interest": the authority delegated is canalized by the requirement that the agency act as the public interest requires. Of course, public interest, like public policy, is an unruly horse, and it is one which the administrator can all but ride where he will. Actually, the standard of public interest furnishes almost no effective limit upon administrative authority. In effect, telling the agency to do what is in the public interest is the same as telling it, "Here is the problem. Deal with it as you will."

That this is what the public interest standard really means in practice is shown by *American Airlines* v. *North American Airlines,* 351 U. S. 79 (1956). The CAB had issued a cease and desist order against the use of the name "North American" by an airline, holding that it constituted an unfair method of competition in view of the fact that another airline had been using the name "American." The court of appeals set aside this order on the ground that the Board had acted to vindicate the private interest of American Airlines against unfair competition; there was no public interest sufficient to justify the exercise of the Board's jurisdiction. The Supreme Court reversed, stating that it was not for the reviewing court to determine on its own judgment whether the agency had acted in the public interest. Said Justice Minton: "Under § 411 it is the Board that speaks in the public interest. We do not sit to determine independently what is the public interest in matters of this kind, committed as they are to the judgment of the Board. We decide only whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination." *Id.* at 85. Nor, in the Court's view, did it make any difference that the practice involved did

not constitute an unfair method of competition at common law.

In its view, "Unfair or deceptive practices or unfair methods of competition," as used in § 411, are broader concepts than the common-law idea of unfair competition. The section is concerned not with punishment of wrongdoers or protection of injured competitors, but rather with protection of the public interest. That is all very well, but is it not fundamental in a system such as ours that it is for the courts to determine whether there is, in actuality, a substantial basis for the agency finding that the public interest required its action? For the Court to say that the administrator can be authorized to act in the public interest and that his finding on that point is to be subject to little or no review is, in effect, to say that his regulatory field is *carte blanche* upon which he can scribble as he chooses, however inconsistent his scribbling may be with existing law on the subject.

Review of Mixed Questions.—Perhaps the most difficult problem still remaining in the field of scope of review is that of the extent to which courts should review so-called mixed findings of law and fact. Under the doctrine of *Gray* v. *Powell,* 314 U. S. 402 (1941), such findings are to be treated like findings of pure fact, for purposes of determining the proper scope of review. The Supreme Court's 1951 decision in *NLRB* v. *Highland Park Manufacturing Co.,* 341 U. S. 322 (1951), on the other hand, treated such a finding as one of law to be reviewed fully. The agency finding at issue there was that the CIO was not a "national or international labor organization" under the Taft-Hartley Act provision requiring the officers of such organizations to file non-Communist affidavits. As already stated, the Court in *Highland Park* treated such finding as one of law and, deeming it erroneous, set it aside. In 1956 a question similar to that in *Highland Park* was presented in *NLRB* v. *Coca-Cola Bottling Co.,* 350 U. S. 264 (1956). There the question at issue was that of who were "officers" required to file affidavits under Taft-Hartley. The court of appeals had rejected the test used by the NLRB in favor of a test articulated by itself. The Supreme Court reversed, stating that this was a case where the expertness of the Board came into play. The administrative definition should be affirmed if it did not appear too far-fetched. In this case, said the Court, "the Board's criterion for determining who are officers * * * is a reasonable, if indeed not a compelling, construction of the statute." *Id.* at 269. Accordingly, the Board must be upheld.

The *Coca-Cola* decision is clearly in line with the doctrine of *Gray* v. *Powell.* The only difficulty arises from the *Highland Park* case where the finding was basically similar to that at issue in *Coca-Cola* but the Court asserted that it was one of law which was open to full judicial inquiry. If this was true in *Highland Park,* why not in *Coca-Cola?* It may be too much to expect the high Court to follow its own recent precedents; yet if it does not do so, it is surely under a duty to the legal profession either to distinguish or overrule the prior case. "If there is no meaning

in it," said Alice's King, "that saves a world of trouble, you know, as we needn't try to find any." Supreme Court decisions presumably have meaning. But if the Court itself does not make that meaning clear, the public and the bar that advises them are left only with the method of Alice's King, which is certainly far from satisfactory for any legal system this side of Wonderland.

Compare *East Texas Motor Lines* v. *Frozen Food Express,* 351 U. S. 49 (1956), where the Court appeared to follow the *Highland Park* approach. At issue in the *East Texas* case was an ICC cease and desist order preventing a motor common carrier from transporting fresh and frozen poultry in interstate commerce without a certificate of convenience and necessity from the Commission covering such commodities. The Act exempts from its licensing requirement carriage of "agricultural * * * commodities (not including manufactured products thereof)." The ICC had held, however, that the poultry transported was not within the exemption, since it was a "manufactured product" within the statutory provision. The Supreme Court held that the Commission's ruling did not square with the statute. The statutory exemption, it emphasized, was designed to preserve for the farmers the advantage of low-cost motor transportation. The victory in the Congress for the exemption was recognition that the price which the farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state or after they have become marketable by incidental processing. This policy should apply just as much where the agricultural commodity has been subjected to incidental or preliminary processing. Says the Court's opinion (with almost poetic understatement), "A chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we cannot conclude that this processing which merely makes the chicken marketable turns it into a 'manufactured commodity'." *Id.* at 54.

How does the Court explain the difference in result here as compared with the just-discussed *Coca-Cola* case? Says Justice Douglas, "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates. * * * But Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits. * * * Those limits would be passed here if the Commission were permitted to expand 'manufactured' to include such incidental processing as is involved in dressing and freezing a chicken." *Ibid.* Yet the whole point about *Gray* v. *Powell* and cases like *Coca-Cola* following it is that they apply the rule of limited review to findings upon which the statutory powers of the agency depend. What the Court says here is just as applicable to those cases. Or is there something unique and particularly deserving of judicial protection in dressed chickens? Truly these cases show what Mark Twain once meant when he said, "The more you explain it, the more I don't understand it." See *Schwartz, Gray* v. *Powell and the Scope of Review,* 54 Mich. L. Rev. 1 (1955).

PROCEDURE ACT CASES

Applicability.—According to *Oleson* v. *Stanard,* 227 F. 2d 785 (9th Cir. 1955), the Postmaster General's power to impound mail preliminarily does not include the making of a final order of exclusion from the mails. The use of the mails is not a privilege to be granted or withdrawn at the discretion of the executive, but is a right open to all who conform to the applicable law, and is within the Administrative Procedure Act.

Rule-making.—In *Van Curler Broadcasting Corp.* v. *United States,* 236 F. 2d 727 (D. C. Cir. 1956), the FCC had allocated a VHF channel to a community in petitioners' area. Petitioners were UHF licensees complaining of such allocation. The Commission had acted, in accordance with its established procedure, in what it termed a rule-making proceeding. An application for a rule-making proceeding to amend the Table of Assignments of television channels was made, the procedure prescribed by the APA for rule-making was followed, and the Table of Assignments amended by the order under review. The court held that, since all the procedural requirements of section 4 of the APA were followed, the order was valid. One wonders, however, despite this and other decisions, whether the FCC has not been permitted to deny the substance of the adjective rights granted in our administrative law by couching, in terms of a general rule-making proceeding, what is really a decision of particular licensing cases. It is true that, in form, the license application comes later. In substance, all the same, does not the instant order predetermine the major issues in the license proceeding? According to Judge Bazelon, who dissented, such a predetermination violates the spirit of *Ashbacker Radio Co.* v. *FCC,* 326 U. S. 327 (1945). That the proceeding referred to in that case was adjudicatory while this one is rule-making does not alter the case. This may be rule-making, but it is *particularized* rule-making directed at one specific situation. In such a case, as in rate-making (which is also rule-making, semantically speaking) adjudicatory procedural safeguards should protect the parties, and not only the minimal requirements of section 4 of the APA.

Notice.—In *Florida Citrus Commission* v. *United States,* 144 F. Supp. 521 (N. D. Fla. 1956), an action to set aside an ICC order permitting increases in refrigeration charges by rail carriers, it was contended that the Commission had violated the requirement of notice of section 5(a) of the APA. The court stated that wherever it appears that the absence of notice has resulted in prejudice to a complaining party the action of the administrative agency will be set aside. But, said it, no prejudice is shown where, as in this case, the party complaining had actual knowledge of and participated in the administrative proceedings and he will not be heard to complain of the failure to give formal notice.

Examiner rotation.—In *Tractor Training Service* v. *FTC,* 227 F. 2d 420 (9th Cir. 1955), it was contended that the Com-

mission had violated the APA provisions under which hearing examiners "shall be assigned to cases in rotation so far as practicable" and "the officer who presided * * * shall initially decide the case." Hearings in the case were first held in Washington, D. C., before one examiner. At that time only one witness was examined. The hearing was recessed after two days for over a month and resumed before a second examiner. The substitution of examiners was promptly challenged by petitioners as a violation of the requirement that examiners be assigned in rotation. In overruling the objection, the Commission gave as its reason for the substitution that other hearings were to be held by the second examiner in the western part of the United States where future hearings in the instant case were scheduled; hence the substitution was in the interests of economy. At the resumed hearings of the case, the second examiner offered to strike all testimony previously taken and begin anew or, at petitioners' option, to consider the transcript of testimony theretofore taken. Petitioners stood on their objection to a change of examiners. A transcript of the testimony of the witness taken in Washington, D. C., was introduced at a subsequent hearing in Portland, Oregon, and at the Portland hearing the witness again testified, covering substantially the entire ground gone over in the Washington, D. C., hearing.

According to the court, there was no violation here of section 8(a) of the APA. It provides that the initial decision shall be made by the hearing officer who presided. The second examiner made the initial decision. The fact that he did not preside over the Washington hearing in no manner changed this situation. He heard all the evidence and from the evidence formulated the first and only decision rendered. Said the court, this was a full compliance with the requirements of section 8(a).

Nor did the court uphold the contention that the substitution of examiners violated section 11 of the APA, which requires that hearing examiners "shall be assigned to cases in rotation so far as practicable." According to the court, several federal agencies have interpreted section 11 as allowing them to deviate from mechanical rotation in the interests of economical operation. The substitution here was made early in the proceedings. Petitioners were afforded an opportunity to start anew. There is no suggestion of any intention on the part of the Commission to deprive petitioners of a fair hearing or that the second examiner was biased or incompetent. The change of examiners in no way prejudiced petitioners. The APA, said the court, contemplates a modicum of discretion on the part of the agency and the substitution which the FTC had made was a permissible modification of the rotation rule.

Examiner decisions.—In *Channel 16 of Rhode Island* v. *FCC,* 229 F. 2d 520 (D. C. Cir. 1956), the Commission had provided for a hearing on a protest against the grant of a permit to construct a television station and for a decision by it after such hearing, which decision constituted the final agency decision in such matter. The court held that this violated the procedure

prescribed in section 409(b) of the Communications Act, under which the examiner must file an initial decision after hearing. The exceptions in that section did not apply here. In this case the examiner who conducted the hearing did not become unavailable, nor did the Commission find "upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision." The order for the hearing did not explain why the Commission had devised a non-statutory hearing procedure. Its later statement that it had done so in order to "bring a needed television service to Providence as quickly as possible consistent with the requirement of law" was not convincing in view of the time-consuming process which was ordered. The examiner would have needed very little additional time to prepare an initial decision such as the statute requires. Under section 10(e) of the APA, said the court, since the Commission's action was "without observance of procedure required by law", it had to be held unlawful and set aside for that reason alone.

The relevant statute here goes one step beyond section 8 of the APA, since it requires an initial decision by the examiner in every case. As such, it goes in the direction of the relevant recommendation of the Hoover Commission and the Sellers Committee.

Agency review of examiner.—Under section 8(a) of the APA, the agency, on review of an examiner's initial decision, has all of the powers which it would have in making the initial decision itself. As the Supreme Court held in *FCC* v. *Allentown Broadcasting Corp.,* 349 U. S. 358, 364 (1955), 8 Ad. L. Bull. 46, this is inconsistent with the equation of an agency's power to reverse its own examiner's finding with a reviewing court's power to reverse the agency's finding. Despite the weight given examiners' decisions under *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), it is still the agency (not the examiner) who is responsible for the decision, even on issues of fact. An instance of agency overruling of an examiner occurred in *Utica Observer Dispatch* v. *NLRB,* 229 F. 2d 575 (2d Cir. 1956). Relying upon the *Allentown* case, the court held that such overruling was wholly proper, saying "The Board is, of course, obliged to give weight to the findings of its Trial Examiner, especially where they rest on credibility and the demeanor of witnesses. But it may certainly overrule him, even where credibility is involved, if his findings conflict with strong inferences from evidence which he credited." *Id.* at 577.

See, similarly, *Sinell* v. *United States,* 136 F. Supp. 37 (D. N. J. 1955), where the court stated that the ICC, like all other agencies under the APA, is not bound to accept its examiner's findings and may, as here, reject his recommendations and reach different conclusions. In fact, the Commission is the body charged with the responsibility of decision and is not only at liberty but is required to reach its own conclusions upon the evidence.

Right to counsel.—United States ex rel. Nicoloff v. *Shaughnessy,* 139 F. Supp. 465

(S. D. N. Y. 1956), dealt with the question of whether there was a right to counsel in an alien exclusion proceeding. The court held that there was no such right other than that given expressly by the relevant agency regulations. The alien claimed he had the right before the examining officer on his arrival and in the preparation of his statement and information for the Regional Commissioner. As far as procedure before the examining officer, who temporarily detains arriving aliens, was concerned, the court had no difficulty. Such officer, said it, makes no final decision as to those temporarily detained or excluded. The statute does not contemplate a judicial-type hearing before him, nor the right to counsel, nor a duty to advise of such a right. The procedure outlined is a one-sided investigative one with all power in the hands of the immigration officer and with participation by the alien limited to the extent which that officer requires. Nor, according to the court, is the situation different at the stage of preparing the statement and information for the Regional Commissioner. The APA has no application to immigration proceedings, and it is unwarranted to attempt to apply its express provision for the right of counsel to such proceedings. This holding may be sound so far as the application of the APA is concerned. But it leaves unanswered the question of whether, even apart from the APA, the private party does not have a right to counsel in our law.

Findings.—Amarillo-Borger Express v. *United States,* 138 F. Supp. 411 (N. D. Tex. 1956), illustrates the requirement in section 8(b) of the APA that agency orders be accompanied by adequate findings. It involved an action to have an ICC order vacating the Commission's prior action suspending proposed rail rates declared void. The only "finding" made by the Commission was: *"It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor." According to the court, this was hardly enough to satisfy the rule that an agency order must articulate its bases. Said the court: If the cryptic phrase "good cause appearing" is a sufficient indication of action, it will be a self-generating bar to any review. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements.

A similar case is *Long Island Railroad Co.* v. *United States,* 140 F. Supp. 823 (E. D. N. Y. 1956). There, too, the ICC had cited no reasons for its action other than "good cause appearing therefor." The court relied upon the *Amarillo-Borger* case in reaching a similar result. According to the court there, not every exercise of an administrative function is to be sanctioned merely because the necessary power exists; there may be occasions when the exercise of a given power should be accompanied by a fair and informing statement of the reasons which quickened it into action. Such an instance was believed to be present in this case, not only for the

sake of the order under review, but for the effect that such a recital may have upon later aspects of the case.

See *Dixie Carriers* v. *United States,* 143 F. Supp. 844 (S. D. Tex. 1956), also following the *Amarillo-Borger* case.

Licensing.—In *Atlantic Coast Line Railroad Co.* v. *United States,* 144 F. Supp. 53 (D. Mass. 1956), it was held that section 9(b) of the APA, dealing with the expiration of authority pending an application for a new license did not sanction the action of the ICC in authorizing a water carrier to continue to perform temporary water carrier service until determination of its pending application for permanent authority, where such temporary authority extended beyond the 180 days prescribed by the Interstate Commerce Act for the granting of such temporary authority. It should be noted that Judge Wyzanski stated expressly that he concurred solely because of an earlier decision of the court. Were the matter *res integra,* he declared, he would conclude that section 9(b) of the APA authorized the ICC to act as it did.

Availability of review.—Though *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), 8 Ad. L. Bull. 48, held deportation orders subject to review under the APA, its holding does not, according to *Naselli* v. *Holton,* 138 F. Supp. 893 (N. D. Ill. 1956), apply to review of "adjustment of status" proceedings, held before an immigration officer authorized to hear same pursuant to regulations promulgated by the Attorney General under specific statutory authority. According to the district court, the instant proceeding is clearly within the terms of those "specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute" which are not superseded by the Administrative Procedure Act. The court is therefore, according to its opinion, without jurisdiction to review the denial of adjustment of status. It seems, however, that the court is misreading the APA. The exemption referred to by it is in section 7(a). It has to do with hearing procedure and not with the availability of review, which was the only question before the court here.

Preclusion of review.—In *Ford* v. *United States,* 230 F. 2d 533 (5th Cir. 1956), an action was brought under the APA against the United States to recover a payment which the Veteran's Administration had made to others under the Servicemen's Indemnity Act. The court held that the case came within the exception to section 10, as one where a statute expressly precludes review. While the Congressional intention to preclude judicial review of administrative action must be clearly and positively reflected, that standard is met here both by the intrinsic nature of this as an act of pure gratuity from the sovereign's grace, and the categorical declaration that, except for certain specified matters for which a judicial remedy is created, the Administrator's decision on all questions of law or fact concerning a claim for benefits or payments under any act administered by the Veterans Administration shall be final, conclusive and beyond the power of any court to review.

The decision is probably correct under the cases interpreting section 10 of the APA. At the same time, it does show the harshness of the exception of the Procedure Act precluding review. At issue here was a pure question of law. Yet plaintiff can never obtain a judicial determination of it, despite her claim that the agency had answered it erroneously.

Review of discretion.—Amarillo-Borger Express v. *United States,* 138 F. Supp. 411 (N. D. Tex. 1956), involved an action to review an ICC order vacating a previous order suspending proposed rail rates. The Commission contended that its refusal to suspend was not subject to review, since it was a matter committed wholly to its discretion and, hence, within the introductory clause to section 10 of the APA, precluding from review matters committed by law to agency discretion. The court rejected this contention, stating that the mere fact that discretion was involved did not immunize the agency act from judicial control. According to it, a proper regard for the whole reach of the APA and its legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. The language of section 10 was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions upon the basis of administrative expertise are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the APA.

Reliance upon this decision was used to reach a like result in the similar case of *Long Island Railroad Co.* v. *United States,* 140 F. Supp. 823 (S. D. N. Y. 1956).

With these decisions should be compared *Hargett* v. *Summerfield,* 137 F. Supp. 876 (D. C. 1956). It concerned an action by a first-class postmaster against the Postmaster General contesting action taken to remove plaintiff from his position, on the ground that he was not devoting the full time required to his duty. The court held that the action of the Postmaster General in removing plaintiff from his position was a matter committed to his sound discretion, and plaintiff had been accorded all the procedural rights to which he was entitled. There is nothing in section 10 of the Administrative Procedure Act which provides for a review such as plaintiff seeks.

Scope of review.—Schaffer v. *United States,* 139 F. Supp. 444, 448 (D. S. D. 1956), contains a summary of the present narrow scope of review in federal review actions. At it is expressed by Chief Judge Mickelson, "The scope of judicial review of the decisions of independent administrative bodies, in this case the Interstate Commerce Commission, is now well settled and is no longer open to question. The rule may be stated in various ways, one of which is, that findings of fact and permissible conclusions thereon, based upon

substantial evidence, are final, conclusive and binding upon the Court. * * * In the development of the doctrine and rule of administrative finality, courts have uniformly held that it is the exclusive province and function of administrative agencies to draw legitimate inferences of fact and make findings and conclusions of fact, to appraise conflicting testimony or other evidence, to judge the credibility of witnesses and the evidence adduced by the parties, and to determine the weight of the evidence. * * * And what has just been said holds true even though the court believes that the decision of the administrative body lacks wisdom; though the court would weigh the evidence differently and reach a different conclusion from that of the agency; or that the final decision is inconsistent with prior determinations arising under analogous or similar basic circumstances." According to the learned judge, section 10 of the APA has codified these limitations upon the scope of review. Even if he has overminimized the role of the courts under *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), the substance of his opinion on this point is essentially accurate.

OTHER FEDERAL CASES

Right to be heard.—United States ex rel. Kasel de Pagliera, 139 F. Supp. 143 (S. D. Fla. 1956), strongly reaffirms the basic adjective rights inherent in our administrative law. The case involved two aliens excluded by the Immigration Service. One was seeking entry for the first time; the other was a resident seeking re-entry. The court held that the aliens had a right to present written statements and accompanying information which had to be considered by the agency, as well as a right to be informed of the reasons why they were being excluded. It is recognized that the decision goes beyond the prior cases on the subject, which have drawn a sharp distinction between deportation and exclusion, holding the latter not subject to the demands of due process. The distinction is, however, an illogical one which has been sharply criticized. To afford adjective rights even to the entering alien (particularly if he is a re-entering resident) is surely more consistent with the conception of due process. As the instant court eloquently states, after conceding that the present law may be contrary to its holding: "But a court of common law, informed as to the history and principles of Anglo-American jurisprudence, is always reluctant to support or countenance measures, judgments, or orders affecting human rights and liberty that do not comply with constitutional provisions regarding due process. Man's political evolution in countries enjoying Western civilization has gone beyond the practices of fiat government and 'cloak and dagger' diplomacy. Having learned the blessings of government by law, men are apprehensive of practices that belong to government by men. Whenever governmental agencies are permitted to operate in secrecy, capricious and arbitrary orders are likely to become prevalent. Administrative orders, based on secret information, should be indulged only when the reason for such

orders is clear and impelling. The sunshine of publicity keeps government rational, lawful and just." *Id.* at 145-6.

Compare *United States ex rel. Nicoloff* v. *Shaughnessy,* 139 F. Supp. 465 (S. D. N. Y. 1956), holding that before an alien could be finally excluded on the basis that he would prejudice the public interest or endanger national security, he was entitled to submit a written statement and accompanying information.

An interesting application of the rule of *Ashbacker Radio Corp.* v. *FCC,* 326 U. S. 327 (1945), is contained in *Delta Air Lines* v. *CAB,* 228 F. 2d 17 (D. C. Cir. 1955). The court there held that the rule of the *Ashbacker* case applied to air route controversies and that it was a rule of substance and not a mere prescription of form. In line with this view, the court held that where a first airline, which was seeking a certification of route, alleged that its application and a second airline's pending application were mutually exclusive, the first airline was entitled to a comparative hearing, and was entitled to have stayed a proceeding whereby the Board proposed to consider the second airline's application on its merits without hearing the first airline and deciding whether the first airline had a right to a hearing as a mutually exclusive applicant. According to the court, it was not enough for the agency, in such a case, to decide the two applications together, after hearing them separately. Where the applications of two qualified applicants for a license are as a matter of economic fact mutually exclusive, each applicant is entitled to a comparative hearing and consideration with his adversary. Mere "simultaneous decision" does not meet the requirement. The court was concerned with the right to hearing, not merely the rendition of decision. The requirement for a comparative proceeding means all the give-and-take of contesting parties, including cross-examination, rebuttal, participation in prehearing proceedings, objections, briefs and arguments as contesting parties.

The agency, said the court, has a choice of procedures when two applications are alleged to be mutually exclusive. It may, for example, (1) set for hearing and thereupon decide the issue of exclusivity as a separate preliminary issue; (2) proceed to a comparative hearing upon the two applications without further ado; or (3) set for hearing and thereafter decide the merits of the two applications and also the issue of exclusivity. This leeway gives considerable elasticity to the required procedure.

In *Federal Broadcasting System* v. *FCC,* 231 F. 2d 246 (D. C. Cir. 1956), the Commission had dismissed a protest filed by appellant against an order granting another radio station a renewal of its broadcasting license. The protestant appealed, claiming, among other things, that the Commission could not dismiss the protest without a hearing merely because the licensee had denied all of the allegations in the protest. The court agreed. Only if it is clear from the face of the protest, taking all the protestant's allegations as true, that there is no real merit in protestant's position or substantial possibility that a hearing will reveal merit, should the protest be rejected without a hearing.

According to *American Airlines* v. *CAB,* 231 F. 2d 483 (D. C. Cir. 1956), on the other hand, the Board is not required to hold an evidentiary hearing in proceedings for exemptions in regard to air carrier economic regulation.

Fair Hearing.—A strong condemnation of administrative procedure in an immigration case is contained in *Fausto* v. *Brownell,* 140 F. Supp. 660 (S. D. Cal. 1956). It involved a hearing on the question of citizenship before a board of special inquiry composed of three members. One member of the board was the 21 year old secretary of the chairman. The second member was not present at the hearing. The third member acted as chairman and interrogator. Since the alien spoke no English and only the chairman understood Spanish, he also acted as translator and interpreter. Under the immigration law, boards of inquiry are required to be composed of three members. According to the court, it would appear that in fact this one was composed of one member only—the chairman of the board. It would be rather beyond belief that the secretary of the chairman of the board—a grade two or three clerk-typist assigned to him as his secretary—would not see eye-to-eye with her supervisor (the chairman of the board) in matters like this. And of course the third member of the board was never at any time present at the hearing. Nor was it contemplated by Congress that, where a special board of inquiry was required to pass upon a citizen's rights, one member could be absent and could cast his vote simply by reading a typewritten record of proceedings which he did not attend and without his ever having seen the applicant or having heard testimony.

This, declares the court, is the sort of "administrative procedure" which caused investigation in Congress relative to administrative agencies constituting themselves prosecutors, juries and judges at one and the same time. This is the activity condemned by the Supreme Court in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950).

Bias.—Sardis Luggage Co. v. *NLRB,* 234 F. 2d 190 (5th Cir. 1956), is the latest case to reject a claim of bias in a trial examiner based upon the fact that all important issues of credibility had been resolved in the Board's favor. It has consistently been held, said the court, that this is no proof of bias, unless the credited evidence is inherently unworthy of belief or the discredited evidence irrefutably true. Here, none of the rejected evidence had this quality of inherent veracity and none of the credited evidence carried the mark of obvious falsehood.

Compare *NLRB* v. *Lewisburg Chairs & Furn. Co.,* 230 F. 2d 155 (3d Cir. 1956), another decision rejecting a claim of trial examiner bias. Said the court there: "The feeling that the trier of the fact, be he baseball umpire, trial judge or hearing officer, is biased is not uncommon for one against whom decision has gone. This case presents nothing more than that on this point." *Id.* at 156.

Evidence.—In *Buchwalter* v. *FTC,* 235 F. 2d 344 (2d Cir. 1956), the Commission's

findings were attacked on the grounds that they were based on incompetent evidence and that the evidence accepted by the Commission was unreliable. It was argued that the reports of tests performed under the supervision of the testifying expert were inadmissible as hearsay because the subordinates did not testify and because the expert did not perform the actual tests. But, said the court, administrative agencies are not rigidly restricted by the jury trial rules of evidence. Moreover, added the opinion, even if such rules were applied, it is doubtful whether test reports, when testified to by a person supervising and participating in them, are hearsay.

See also *Williams* v. *Butterfield,* 145 F. Supp. 567 (E. D. Mich. 1956), holding a deportation proceeding not to be subject to the rules of evidence.

Ex parte Evidence.—One of the most difficult problems of our present-day administrative law is that of how to reconcile the requirements of national security with the demands of due process. In the already-discussed case of *Jay* v. *Boyd, supra,* p. 86, the Supreme Court held that the security factor should preponderate, upholding an agency decision based upon confidential information. With the high Court's decision in the *Jay* case should be compared the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester,* 227 F. 2d 708 (9th Cir. 1955). It involved an action by a seaman to enjoin the Coast Guard from enforcing executive orders and regulations instituting a security program for seamen employed on American merchant vessels. As has been the case with all of the Government's loyalty-security programs, those affected have not been given a full hearing as that term is normally understood in our administrative law. Here, too, the decision that a particular seaman was disqualified for security reasons could be based upon confidential information, despite the principle of exclusiveness of the record. In this case, however, the Court of Appeals seized the constitutional issue directly by the bit and held that such a violation of the normal rules of administrative procedure could not be countenanced consistently with the due process clause. Judge Pope began by reiterating the basic principle applicable to agency action: "When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an opportunity to be heard." *Id.* at 716. The seamen were in the position of persons who under ordinary conditions are entitled to all the benefits of due process. The liberty to follow their chosen employment is a right of which they cannot be deprived without full notice and hearing. Nor is the national security interest here such as to overrude the individual's procedural rights. According to the court, it may well be that its decision will make the task of security officials more difficult. "But surely it is better that these agencies suffer some handicap than that the citizens of a freedom loving country shall be denied that which has always been considered their birthright." *Id.* at 720.

The Ninth Circuit court concludes by stating certain basic considerations that should underlie decisions in cases of this type. Says its opinion: "in considering the public interest in the preservation of a system under which unidentified informers are encouraged to make unchallengeable statements about their neighbors, it is not amiss to bear in mind whether or not we must look forward to a day when substantially everyone will have to contemplate the possibility that his neighbors are being encouraged to make reports to the FBI about what he says, what he reads and what meetings he attends. It may be possible that we have reached an age when our system of constitutional freedom and individual rights cannot hold its own against those who, under totalitarian discipline are prepared to infiltrate not only our public services, but our civilian employments as well. In the event of war we may have to anticipate Black Tom explosions on every waterfront, poison in our water systems, and sand in all important industrial machines. But the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists. Such a system was not that ordained by the framers of our Constitution. It is the latter we are sworn to uphold." *Id.* at 721. Since the Government did not apply for certiorari in this case, the decision of the court of appeals remains as *the* binding disposition of the matter.

Also relevant to the question of confidential information and the approval of its use by a bare majority of the Supreme Court in *Jay* v. *Boyd, supra,* p. 86, are the lower court decisions (prior to that case) which unequivocally condemn such use as inconsistent with the traditions and basic principles of our system. See, *e.g., United States ex rel. Dongas* v. *Robinson,* 142 F. Supp. 452 (N. D. Ill. 1956).

Another case involving the question of ex parte evidence is *Petrowicz* v. *Holland,* 142 F. Supp. 369 (E. D. Pa. 1956), where an alien attacked the validity of a deportation order, alleging that there had been a denial of due process. The claim was based upon the refusal of the Examining Officer to submit to the Special Inquiry Officer for examination (and to counsel for plaintiff if there was a basis therefor) written statements given by the witnesses to government agents many months prior to the time of the hearings. The Government claimed that these statements were confidential. The court held, however, that the prime consideration was the desire of Congress to see justice done to persons entitled to judicial review (though, of course, such consideration must be balanced against the need to keep particular matter secret for security reasons). In a case like this, the Government has the duty of revealing all its evidence or letting the alien's violation of the immigration law go unpunished. In view of the seriousness of deportation to the alien concerned, he should be protected by exacting procedural requirements. Here, the evidence in question should be presented either to the court or the special inquiry officer *in camera* and the court states that it would also be glad to consider *in camera* any background facts

the Government may feel are necessary to enable it to pass on the claim of privilege based on the confidential character of the evidence in question.

It would seem that, in a case of this type, the solution most consistent with the spirit of due process is to allow the court *in camera* to examine evidence held confidential for security reasons. This is certainly to do less violence to the bases of our administrative law than the practice approved by the highest Court in a case like *Jay* v. *Boyd, supra,* p. 86. To argue, as the Government does, that even such disclosure is inconsistent with the national interest is to cast unwarranted doubts upon the discretion and integrity of our courts. So-called confidential information, more often than not, is known to a number of persons in the administrative hierarchy. Shall those in the agency have access to the information, and not the presiding officer of justice? Is it suggested that a United States judge is less to be trusted with the information than those in the administration?

Another important field where administrative reliance on *ex parte* evidence has been causing difficulty is that of the grant and revocation of passports. The right to be heard in passport cases is one that has only recently been established by our courts. See 8 Ad. L. Bull. 56-8. Still unanswered is the question of the extent to which hearings in passport cases may depart from the basic requirements established for ordinary cases by our administrative law. In *Boudin* v. *Dulles,* 136 F. Supp. 218 (D. C. 1955), a passport had been denied to plaintiff. A hearing had been held, but the agency decision had been based upon confidential security information, which did not appear upon the record. The court starts by asserting, in strong language, that there is a right to be heard in passport cases. "It must now be accepted that travel abroad is more than a mere privilege accorded American citizens. It is a right, an attribute of personal liberty, which may not be infringed upon or limited in any way unless there be full compliance with the requirements of due process." *Id.* at 220. The court thus bases its opinion upon the elementary principle (too often forgotten in recent years) that if there is a right to a hearing, it is a right to a full, due-process type hearing. "The denial of a passport must therefore comply with due process requirements." *Ibid.*

Can the requirements of due process be squared with decision based upon *ex parte* evidence? To ask this question is, in effect, to answer it. The right to be heard must include the basic right to have the decision based only upon known evidence in the record. If the principle of "exclusiveness of the record" is violated, the right to be heard itself becomes but "as sounding brass or a tinkling cymbal." Of what avail is the right to a hearing, if the agency can at will stray from the record and ground its decision upon evidence known only to it?

As Judge Youngdahl well asks in the instant case: "How can an applicant refute charges which arise from sources, or are based upon evidence, which is closed to him? What good does it do him to be

apprised that a passport is denied him due to associations or activities disclosed or inferred from State Department files even if he is told of the associations and activities in a general way? What files? What evidence? Who made the inferences? From what materials were those inferences made?" *Id.* at 221.

To uphold the administrative action here (based upon a regulation authorizing the use of confidential information) would grant to the Government the right to deny passports in an uncontrolled manner, with virtually absolute authority, at any time and in any way it sees fit. The right to a quasi-judicial hearing must mean more than the right to permit an applicant to testify and present evidence. It must include the right to know that the decision will be reached upon evidence of which he is aware and can refute directly. In the apt words of the instant court, "When the basis of action by any branch of the government remains hidden from scrutiny and beyond practical review, the seeds of arbitrary and irresponsible government are sown." *Id.* at 222.

On appeal, the court of appeals did not deal, as had the district court, with the validity of the use of *ex parte* evidence. It remanded the case to the Secretary of State for him to correct the inadequacy of the findings which, in the opinion of the appellate court, he had made. The court stated expressly that it did not reach in the present posture of the case the contention made that the Secretary cannot rely on confidential information in reaching his decision. *Boudin* v. *Dulles,* 235 F. 2d 532 (D. C. Cir. 1956). See, similarly, *Dayton* v. *Dulles,* 237 F. 2d 43 (D. C. Cir. 1956). There can be little doubt, however, that the contention will come up again in the courts, at which time the validity of Judge Youngdahl's forthright treatment of the constitutional issue will be decided by the higher courts.

Official Notice.—Interstate Power Co. v. *FPC,* 236 F. 2d 372 (8th Cir. 1956), arose out of a proceeding to review an order of the Commission determining that the collection of uniform rates and charges by a natural gas company was unreasonable, unduly discriminatory and preferential and establishing zones based upon distance from the natural source of supply. In determining the zones in question, the Commission had rejected the zones proposed and opposed at the hearing before its trial examiner and had fixed its own new zones without any further hearing.

The petitioners contended that when the Commission decided to reject the several defined zones which were proposed and opposed on the hearing, it should have given notice and held a hearing in respect to the particular zone lines which it contemplated establishing. They argued that they were denied due process in this respect. The court rejected this contention. While, according to it, it cannot be denied that the course contended for would have been held appropriate if the Commission had followed it, it could not find a denial of due process in the course that was followed. The Commission is one of those agencies presumably equipped or informed by experience to deal with a specialized

field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess. It has been delegated by the Congress to administer the Natural Gas Act with power to draw inferences from the facts. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment, and particularly its findings and directives need not be based directly on the expressed opinion of experts, but may be drawn from the facts.

Time Limits.—In Valley Broadcasting Co. v. *FCC,* 237 F. 2d 784 (D. C. Cir. 1956), the Commission had dismissed, as untimely filed, a protest filed by the appellant protesting the grant without hearing of a permit for a new radio station in an area served by appellant. Under the statute, the protest of a party in interest must be filed within 30 days of the Commission's grant. The final day for this filing was November 21, 1955. The Commission has by rule fixed business hours, the termination of the business day being at 5 P. M. On November 21, shortly before 5 P. M., the appellant's counsel appeared in the office of the Commission for the purpose of filing the protest. His protest was not fully assembled and his certificate of service had to be prepared before all of the documents constituting the protest were actually in condition to be presented for a formal filing. This was completed at about 5:20 P. M. or not later than 5:30 and the papers were received by a clerk; thereafter, either that night or the following morning, the papers were stamped as filed November 21, 1955. On November 23, the Commission entered an order and advised appellant that the protest deposited November 21, 1955 was *not* a timely filing. The position of the Commission was that any tender for filing at any moment or point of time after 5 P. M., the regular closing time of the office, did not constitute a filing on that business day even though the document might be physically received and taken by the staff.

According to the court, however, the Commission's refusal, in these circumstances, to accept the protest was arbitrary. The FCC is not in the position of the private litigant who may seize on any and all technical snares to win his case. The Commission is a public agency and should assist citizens and lawyers in assembling papers presented for filing whether presented at the last permissible moment or even earlier.

The intent and purpose of Congress, says the court, in allowing an aggrieved party to file a protest and thereby secure an open hearing on the whole subject was to make sure that those who demonstrate they are "parties in interest" will have an opportunity to show the Commission that it is about to make a mistake against the public interest. Thus the hearing serves important public purposes beyond the narrower interests of the protestant. "Zeal for orderly procedures hardly calls for such Cinderella-like treatment of a protest when the filing party is in the filing office before closing time to present the necessary documents. The denial of the right to a public hearing in these circumstances

cannot be allowed to stand on such arbitrary grounds." *Id.* at 787. It is, indeed, hard to justify a public agency insisting upon the technical letter of the law in a manner to delight the heart of a Baron Parke. An agency like the FCC should be more interested in vindicating the public interest than in insising upon its "pound of flesh" from the private party.

Findings.—Monrote v. *Britton,* 237 F. 2d 756 (D. C. Cir. 1956), was a suit by an employee to compel a deputy commissioner of the Bureau of Employee's Compensation to issue a revised order holding the employer liable for certain medical expenses. Defendant had determined the employer was not liable for such expenses because it had not "refused or neglected" to provide medical services within the meaning of section 7 of the Longshoremen's and Harbor Workers' Compensation Act.

The deputy commissioner contended that his determination must be sustained because the "record as a whole does not show that the circumstances specified in Section 7 for reimbursement, existed." But, said the court, his determination can be sustained only if there are adequate findings to support it. And, in the court's opinion, they were not adequate here. The findings of fact failed to make explicit the basis for the statement that claimant's treatment by a physician of her own choice was "without the employer's authorization." They did not reflect, for example, what, if any, significance the deputy commissioner attributed to the employer's disclaimer of liability for treatment on the ground the injury was non-compensable, if in fact such disclaimer was communicated to appellant before surgical expenses were incurred. There were no findings or conclusions with respect to appellant's uncontradicted testimony that the employer's attorney authorized her to enter the hospital. Nor was there any evidence that the commissioner's decision took into account a letter in which appellant's attorney notified the employer that the expenses of the contemplated surgery would be included in appellant's claim. If the deputy commissioner disregarded appellant's uncontradicted testimony because he deemed it incredible, he was required to say so explicitly. If he accorded it full weight but thought this testimony, together with the letter and the disclaimer of liability, was immaterial under section 7, the question arises whether he followed too literal a view of the statutory requirements for reimbursement.

Judicial review of administrative action, said the court, cannot rest upon a record which requires speculation upon these matters. Accordingly it reversed the district court's order granting appellees' motions for summary judgment and remanded the case with directions to set aside the deputy commissioner's action under attack here, and to afford him an opportunity to clarify these matters by supplementing the record.

Prejudicial Error.—It is often argued that the rule of prejudicial error should apply in an administrative, as it does in a judicial, proceeding. *Simmons* v. *United States,* 348 U. S. 397 (1955), discussed in 8 Ad. L. Bull. 44, appeared to reject this view, holding that, where an agency vio-

lates a procedural rule, the party aggrieved need not show specific prejudice. *Dobrenen* v. *United States,* 235 F. 2d 273 (9th Cir. 1956), adopts a similar approach. In it, the court held that a selective service registrant had a right to be supplied with a copy of the Department of Justice's recommendation to the selective service appeal board. The Government argued that no prejudice was shown from the failure to supply the copy to the registrant since he personally knew all of the facts set out in the recommendation letter. According to Judge Stephens, even if this was true, it made no difference. The registrant had a right to a copy of the recommendation, which was not defeated by the claim of lack of prejudice. It may be that he knew all of the facts set out in the recommendation letter. But he also had a right to know how they were presented to the board.

Raising of Issues before Agency.—Elbow Lake Coop. Grain Co. v. *Commodity Credit Corp.,* 144 F. Supp. 54 (D. Minn. 1956), illustrates the basic rule that the private party is barred from raising on review issues which he could have raised, but did not, before the agency concerned. Plaintiffs contended that a "representative sample" within the meaning of the regulations issued under the United States Grain Standards Act could not be obtained by the belt or bin run method of sampling. But, declared the court, there is a well-recognized legal principle which prevents it from exercising jurisdiction. The regulations require that inspection and grading of grain be based on a "representative sample". Any administrative official authorized to review a grade determination must impliedly have the authority to determine whether it was based on a "representative sample" as required by the regulations. This is particularly true here where we are concerned with the interpretation of a standard set forth in a regulation issued by the agency. The plaintiffs had ample opportunity to raise this issue during administrative proceedings but failed to do so. The Secretary of Agriculture has not considered nor made a finding as to whether a "representative sample" was procured. Where a party has the opportunity to raise an issue in an administrative proceeding but fails to do so, he will not be allowed to raise that issue for the first time in a judicial review proceeding. This rule, said the court, seems singularly applicable here where we are dealing with the interpretation of a standard to be applied in the inspection of grain—a query which should be directed in the first instance to the specialized skill and technical competency of the administrative officials who are trained to promote and maintain the aims and purposes of this Act. See, similarly, *Farmers Coop. Elevator Co.* v. *Commodity Credit Corp.,* 144 F. Supp. 65 (D. S. D. 1956).

Primary Jurisdiction.—The second circuit has had a number of cases in recent years involving application of the primary jurisdiction doctrine in tort actions against air carriers. See 8 Ad. L. Bull. 70-71. The most recent of them is *Fitzgerald* v. *Pan American World Airways,* 229 F. 2d 499 (2d Cir. 1956). It arose out of an

action by airline passengers against an airline for damages for alleged violation of statutes prohibiting air carriers from effecting discrimination. Plaintiffs were Negroes who were, according to the allegations of their complaint, refused accommodations on defendant's planes solely because of their race. Defendant contended that the sole non-criminal federal remedy for a violation of any provisions of the Act was to be found in a complaint to the Civil Aeronautics Board which must investigate the complaint and, if the facts warrant, must issue an order compelling compliance with the violated provisions of the Act. The court declared it could not agree. As such an order must look to the future, obviously it cannot afford redress to one harmed by a violation of the statutory prohibition against discrimination. "For, whatever may be true of the flight of a plane, undeniably (outside of fiction or 'pure' physics) the flight of time—despite the poet Hood's earnest prayer—is always, alas for us mortals, irreversible. At any rate, no order of the Board can compel the defendant in 1956 to permit the plaintiffs to board defendant's plane on July 19, 1945." *Id.* at 502.

This is not a case, the court states, where the Board has "exclusive primary jurisdiction": (1) The Civil Aeronautics Act, unlike the Interstate Commerce Act or the Shipping Act, confers no power on the administrative agency to grant reparation in money for past misconduct of the carrier. (2) The Board has no power to approve violations of the statutory prohibition against discrimination. (3) Nor has it purported to do so.

Exhaustion of Administrative Remedies. —In *Parker* v. *Lester,* 227 F. 2d 708 (9th Cir. 1955), a seaman brought an action for an injunction to restrain the Coast Guard from enforcing certain executive orders and regulations issued and adopted for the purpose of excluding from employment upon merchant vessels persons not found to be "safe and suitable" for such employment. At the threshold of the argument in the court, the Government asserted that the appellants had no standing to prosecute this action for the reason that they had failed to exhaust their administrative remedies. The Coast Guard had provided in its regulations for appeals by seamen refused security clearances to local appeal boards and a national appeal board. Plaintiffs had not prosecuted such appeals. The court held, however, that such failure to exhaust administrative remedies was not conclusive here. When the nature of plaintiffs' action is considered, said the court, it is apparent that no rule relating to prior exhaustion of administrative remedies can deprive the court of authority to pass upon the issues here present. The doctrine of exhaustion of administrative remedies has application in certain types of cases, all of which are substantially different than that presented here. The exhaustion doctrine was said to apply only to cases involving *review* of agency action. According to the court, this is not such a case, for the proceeding in the lower court was not a proceeding designed to review administrative action. This case is of a character which traditionally is for consideration and determination in a court of equity. It seeks the traditional injunctive relief.

Plaintiffs were able to show and did show that the defendants through the application of the alleged void and unconstitutional regulations had deprived them of employment and were threatening further to deprive them of future work as merchant seamen. The court states that it can perceive no reason why it must stay its hand until the plaintiffs have completed the so-called appeals authorized by the regulations. Here the constitutional validity of those regulations is under direct attack. Here no fact, evidential or ultimate, is in controversy. The controversies here involve only questions of law.

It is perhaps ungracious for one who has consistently criticized the extreme application of the exhaustion rule in the federal courts to express doubts at this decision. Certainly, there is ample reason for refusing to require exhaustion of agency remedies where, as here, constitutional issues alone are involved. All the same, the Supreme Court has held that administrative remedies must be resorted to first even in such a case. *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947). The instant court's attempt to distinguish that case is not convincing, even to one who sympathizes with its desire to accord instant review.

According to *Odell* v. *United States,* 135 F. Supp. 539 (Ct. Cl. 1955), the statute of limitations is not tolled when Congress has not made the exhaustion of administrative remedies a condition precedent to suit. Yet, even in such a case, it is clear that if Congress has made available an administrative remedy, one must exhaust it before he can resort to the courts. The court recognizes that it may be incongruous to say that the statute of limitations is running against a claimant during the time when, if he did file his suit in court, the Government would urge dismissal on the ground that his suit was premature because he had not exhausted his administrative remedies. All the same, its recognition does not change its decision.

Compare *Curtis* v. *Schaffer,* 137 F. Supp. 683 (S. D. N. Y. 1955), where the court held that where a person seeking to enjoin a fraud order issued by the Postmaster General, after adverse decision had been entered against him in an administrative proceeding, had filed a notice of appeal but had proceeded no further and his appeal had been dismissed upon default, he had failed to exhaust his administrative remedies and had no standing to maintain an action for injunction. The doctrine of exhaustion of administrative remedies, said the court, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. Here, at the most, plaintiff initiated the prescribed administrative appeal by filing his notice, but he went no further, with the result that he defaulted on the administrative appellate procedure. And he may not assert the exhaustion of administrative remedies by default.

Administrative Finality.—A number of cases hold agency action conclusive and not subject to any review. *Bernstein* v. *Herren,* 141 F. Supp. 78 (S. D. N. Y. 1956),

holds that an army discharge is conclusive and may not be subjected to judicial review. Plaintiffs there sought a judgment declaring their rights in respect to the Army's administrative procedure for the discharge of persons whose continued service was determined to be inconsistent with the interest of national security, and for an injunction restraining any further proceedings by the Army toward their discharge. The court held that it did not have jurisdiction over the subject matter of the controversy. According to its opinion, plaintiffs were legally inducted into the armed forces and are subject to the jurisdiction of the Army. Whether they are to be discharged prior to the expiration of the period of required service and if so, when, is not subject to judicial review. The Army likewise has the sole right to fix the qualifications of those whom it chooses to retain. No court is vested with jurisdiction over the Army to the extent that it may forbid or restrain a discharge or order one discharged restored to duty.

See, similarly, *Harmon* v. *Brucker,* 137 F. Supp. 475 (D. C. 1956). In it, the court, after declaring and applying the rule that it had no jurisdiction, went on to assert its dissatisfaction with it. According to it, a soldier, once discharged, cannot be tried by the military for a crime alleged to have been committed while he was in the service. Similarly, the military cannot try a man for alleged criminal conduct committed prior to his entry into service. "Does it not equally offend our traditional concept of justice that a man who serves the military with a rating of excellent can be dismissed by it, without being found disloyal, for non-criminal conduct which occurred primarily, if not exclusively, prior to induction, and can be furnished a discharge certificate which, by reflecting more than a record of military service, brings reproach and dishonor, in civilian life?" *Id.* at 478.

A comparable case is *Reap* v. *James,* 232 F. 2d 507 (4th Cir. 1956). The court there held that it had no jurisdiction to review an order of a local board ordering a physician to report for induction, in an action for a declaratory judgment or for an injunction. It should be noted that, in such a case, there is no absolute preclusion of review, but only a barring of direct review at this stage. If there is no basis in fact for the order of the board, it may be treated as void in a criminal action for failure to report for induction or in a habeas corpus proceeding instituted to obtain release from service. There is no basis for holding, however, that an order which Congress has made "final" shall be subject to review by the courts in an action for a declaratory judgment or for an injunction. One wonders, all the same, why an induction order should not now be treated like a deportation order. Until recently, an alien could contest such order only by habeas corpus. Now we see that this was unfair to the alien and we allow him review at the outset. *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955). Why should the same not now also be true of the inductee in a case like that under discussion?

Other finality cases include *Mario Mercado E. Hijos* v. *Benson,* 231 F. 2d 251 (D. C. Cir. 1956), holding that where a

producer-processor of sugar was denied payments, under the Sugar Act, because of non-compliance with the requirement that he pay the prescribed rates for beets or cane purchased from other producers, the producer-processor did not have a claim against the United States based on allegations that the Secretary of Agriculture in fixing rates had held an inadequate hearing and fixed confiscatory rates, in view of the statutory preclusion of judicial review of such administrative action, and the absence of a constitutional right to such review; *Longernecker* v. *Higley,* 229 F. 2d 27 (D. C. Cir. 1956); *Di Silvestro* v. *Veterans' Administration,* 228 F. 2d 516 (2d Cir. 1956); *United States* v. *Perry,* 141 F. Supp. 443 (E. D. N. C. 1956), applying the statutory provision for the finality of decisions of the Veterans' Administrator; *Snapp* v. *Civil Service Commissioners,* 137 F. Supp. 679 (S. D. Ohio 1955), applying a similar statutory provision for the finality of administrative action allowing or denying awards under the Federal Employee's Compensation Act. This statute, says the court, means just what it says; that is, that there shall be no judicial review of the action by the administrative agency.

Finality cases of this type are certainly contrary to the spirit and traditions of our administrative law. The fact that the courts may render such decisions does not, all the same, mean that nothing can be done about them. In these cases, the Congress taketh away; but it may also give back the remedy in the courts. This is illustrated by *United States* v. *Barnett,* 230 F. 2d 926 (5th Cir. 1956). It involved an action on a national life service policy. Prior to 1946, the relevant statute provided, with regard to the type of question at issue, that the administrative decision should be conclusive. In 1946, the statute was amended to provide: "In the event of disagreement as to any claim arising under this subchapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of the title." According to the court, under this amendment, the Administrator's decisions regarding waiver or nonwaiver of premiums (*i.e.,* the question at issue here) are no longer conclusive and binding on the courts, but remain open questions for the court or jury, depending upon whether they appear to be of law or of fact. The findings of the Administrator in these actions are therefore entitled to no presumptive weight, except the deference which a court will always grant to an agency's construction of its own regulations.

Action against United States.—Doehla Greeting Cards v. *Summerfield,* 227 F. 2d 44 (D. C. Cir. 1955), involved an action by a postal user to enjoin the enforcement of parcel post zone rates with respect to certain fourth class mail. The court held that the action was in reality one against the United States which could not be maintained without the Government's consent. According to it, "The action of the Postmaster General is in reality the action of the United States. The United States is

therefore the real party affected by the judgment and against which in fact it will have to operate." *Id.* at 46. Even if the Postmaster General acted erroneously, says the court, he was within the scope of his statutory power; he erroneously performed a statutory duty. It follows that the error of law, if any, was an error in the performance of a function of the sovereign, and the courts may not enjoin the action.

It is to be doubted whether the court itself realized the full implications of its decision and reasoning. If its approach is followed, all non-statutory review actions will be precluded. For, in every case involving review, is not the action at issue really that of the United States? If the agency errs in construing its enabling statute, following the court's reasoning, is not the error one in the performance of a function of the sovereign? But it has been settled in our law ever since the classic decision of Chief Justice John Marshall in *Osborn* v. *Bank,* 9 Wheat. 738 (U. S. 1824), that review actions cannot be defeated on the ground that they are, in reality, suits against the United States. The rule, said Marshall there, is that the only party before the court is the party named in the record. In all cases where only review of an agency act is sought, if the United States is not named, it cannot defeat jurisdiction on the ground that it is the real party in interest. Otherwise, our whole law of non-statutory review could never have developed.

Forms of Action.—According to two members of the Court of Appeals for the Ninth Circuit, for the purpose of deportation proceedings, the sweep or the search of habeas corpus and a complaint for declaratory relief is the same. That is to say, with limitations on both, anything can be presented now in habeas corpus on a deportation review that could be presented by a complaint for declaratory relief. *Crain* v. *Boyd,* 237 F. 2d 927 (9th Cir. 1956).

Reviewable Action.—Order 174 of the FPC has been before the courts of appeals in at least three cases. That order arose out of the highest court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954), holding independent producers and gatherers of natural gas subject to the jurisdiction of the FPC. The FPC then issued the order in question prescribing rules of general applicability to those persons determined by the *Phillips* case to be within the Commission's jurisdiction. Among other things it required all independent producers who on or since June 7, 1954, had engaged in the interstate transportation and sale of natural gas subject to the Act to (1) file their contracts in force on June 7, 1954, which in effect became their rate schedules; (2) make no changes in the June 7, 1954, rates except after notice to the Commission and subject to its right to suspend such changes; (3) apply to the Commission for certificates of public convenience and necessity covering gas sales made by them; and (4) continue any sales or services rendered until termination was given the express approval of the Commission. A number of gas companies brought actions to review

the FPC order, but, in several cases, it was held that such order was not ripe for review. *Magnolia Petroleum Co.* v. *FPC,* 236 F. 2d 785 (5th Cir. 1956), and cases following to p. 844; *Amerada Petroleum Corp.* v. *FPC,* 231 F. 2d 461 (10th Cir. 1956); *FPC* v. *Union Producing Co.,* 230 F. 2d 36 (D. C. Cir. 1956).

According to the Tenth Circuit Court, the order at issue was not directed specifically against any of the gas companies. Instead, it was a general order: it was prospective in nature and of general applicability and not subject to review. The challenged order was directed to no one. If petitioners were right in their contention that their activities did not bring them within the Commission's jurisdiction they need do nothing. The difficulty, the court concedes, is that if it is ultimately determined that they are under the jurisdiction of the Commission then their failure to comply with the general order subjects them to severe penalties. But that is a difficulty inherent in the way in which the need for the exercise of the Commission's authority arose.

According to the District of Columbia court, the petitioner had been premature in seeking judicial redress. In its view, petitioner had not exhausted its administrative remedy. Its petitions before the Commission were chiefly directed to the order as a whole. It could not properly raise the question whether the order would apply to particular situations, except perhaps to show a need for clarification. The Commission took the view that such questions must wait. This was a reasonable attitude. A petition for a declaratory ruling from the Commission would seem to be the appropriate remedy.

These cases seem to take an unduly narrow approach to the question of reviewability of agency action. In *Columbia Broadcasting System* v. *United States,* 316 U. S. 407 (1942), the Supreme Court held general regulations directly reviewable. In the *Magnolia Petroleum* case, the Fifth Circuit court sought to distinguish the *Columbia Broadcasting* case. The argument based on it, said the court, presupposes that a parallel can be drawn between the order complained of in the *Columbia Broadcasting* case and the order sought to be reviewed here and that petitioners are entitled to the same relief as was afforded to appellant in *Columbia Broadcasting* under the review provisions of the Federal Communications Act. The argument, in the court's view, is not persuasive. These FPC regulations do not change petitioners' existing or future status and do not subject them to the Commission's jurisdiction. Order 174 is not a formal determination of any right or obligation, is not self-executory, and does not command these petitioners to do or to refrain from doing anything. In the *Columbia Broadcasting* case, on the other hand, the very existence of the regulations had, without anything more, an immediate effect on the business of the party attacking them. Furthermore, reviewability here is not equated with irreparable harm, and is not governed by the same tests as reviewability under the Federal Communications Act.

Despite the attempt of the instant court to distinguish the *Columbia Broadcating*

case, however, it seems directly in point here. Those subject to regulations should be able to challenge their legality at once, without having to violate them and thus be placed in the invidious position of being subject to a penalty if they are held to be valid.

That a holding of reviewability is really called for here is well shown by a well-reasoned dissent by Judge Brown in the *Magnolia Petroleum* case. According to him, the decisions denying review in these cases "are too much the product of an excision under the artificial sterility of a laboratory test with inadequate regard for the realities. They have absorbed too completely the recurrent plea of the Commission that these cases are not to be reviewed 'in a vacuum'—a figure with which I am in agreement as an aid to analysis. A vacuum is to be avoided because a vacuum lacks air, that is, the oxygen, life-giving qualities of facts and actuality. Differing not in the least on the need for oxygen (facts), it is my view that it is the Court, not these records, which has cut itself off from the abundant supply. For it is not only air which we need and which we have, but gas. * * * as the heavy hand of Government descends upon citizen or business, the Court need not, in its sheltered retirement, divorce itself from knowledge of life as though it were something profane or permit Government administrators, with their inevitable parochial provincialism, to determine the nature of the activity being scrutinized through the theoretical notions conceived or contemplated in some monolithic redoubt." 236 F. 2d at 794.

The decisions denying review, said Judge Brown, "come about from the theoretical approach which does not adequately reckon with the practical everyday processes of the gas industry in its numerous phases, and an appraisal of the impact of these administrative actions in the light of realistic actuality. I think an examination of all of these cases in their major categories will demonstrate the practical decisive business consequences of these actions." *Ibid.* Judge Brown goes through the effects of the FPC order in some detail and shows clearly its immediate impacts. As he puts it, with regard to some of the effects, "by virtue of the Order 174 regulations, a person who, at the time of the contract, was considered an individual enterpriser under no Governmental restraint or regulation, is suddenly informed that the contract rates to be paid to him in the last half of the contract period (and without which he would not have made the bargain) have no validity as a contract henceforth, and if collectible, they are so only by order after a hearing by a Governmental bureau. Anyone outside of a courtroom would say that that was a real and present impact. I think Judges must recognize it as well. And this business impact is not limited to pre-existing contracts. These petitioners are engaged in the search for and continuous production of gas. How can it be said that the presence of this regulation evincing a determined radical change in policy does not have a weighty and pressing effect upon current business judgments and transactions? If truck owners and television sta-

tion owners are given the protection of judicial reviewability of orders of general application, regulations which alter markedly their business activity or immediately encumber, frustrate or handicap business plans, * * * I would think these producers make out as appealing a case. As long as this regulation stands, new contracts cannot be made which give this margin of protection against unknown future changes over the long contract periods. Somehow the business man, as the gas producer, will have to adapt his activities to that situation. If he raises his rates to secure the aggregate of what was formerly on a sliding scale, he may lose the purchase-sales contract. If he reduces the price to a lower figure, he may soon find himself with a contract out of harmony with his neighbors. The point here is not whether this is good law or bad law; whether the regulation is valid or invalid—it simply is that as long as it stands undetermined all business is unavoidably affected by it. Until this regulation is tested and the validity of this policy is determined, a major industry must speculate." *Id.* at 809.

Kulp & Gordon, Inc. v. *United States,* 144 F. Supp. 456 (E. D. Pa. 1955), is another case where the test of ripeness for review was held not to be satisfied. The plaintiffs there had been granted a certificate of public convenience by the ICC for the purpose of transporting "structural steel and iron, equipment, supplies and materials, used or useful in the installation or erection of such commodities". The predecessor of petitioners had been operating under the above authority and had been transporting ingots, billets and bars continuously under it. A question arose between the parties as to whether the ingots and bars feature was covered by the authority. The plaintiffs decided to have some formal expression of opinion on this question and petitioned the Commission to hold a proceeding for the purpose of clarifying the type of commodities which it could carry, taking the position that ingots, billets and scrap were included in the definition of structural steel. The plaintiffs asked for a plenary hearing, which was denied. However, the proceeding did culminate in an order of the Commission holding that the plaintiffs' operating authority was interpreted by the Commission not to include transportation of ingots, billets or bars. Plaintiffs not being satisfied with this interpretation and the so-called order filed a complaint to enjoin the Commission and requested a temporary restraining order. The Commission filed a motion to dismiss the complaint for the reason that the court did not have jurisdiction of the subject matter because the order was merely an advisory interpretation and not an Order within the statutes conferring jurisdiction on the court.

The court agreed with the Commission on this point. According to it, at this point in the proceedings the parties had proceeded no further than formally to express their views on the interpretation of the rights of the carriers and no *Order* within the meaning of what legally constitutes an order had been made by the Commission and the court had no authority to enjoin anything that the Commission had,

as yet, done in the case. Future actions could be met as they arose.

The court did, however, advert to the weakness of the unreviewable agency advisory ruling from the point of view of the private parties, namely, that they will, as a practical matter, bind them, though beyond challenge in the courts. It emphasized that care must be taken by the Commission in giving interpretations to carriers upon request not to create a psychological condition of fear so that they will be influenced unduly to accept an interpretation that they honestly dispute. No interpretative order, declared the court, can be used as a substitute for an order made after a plenary hearing. One may wonder, however, what sanction there is to prevent an agency from doing what the court thus denigrates.

With the cases just discussed, should be compared *Amshoff* v. *United States,* 228 F. 2d 261 (7th Cir. 1955). The court there held that a Department of Agriculture regulation, reversing an administrative policy of 20 years' standing, that packers' employees who buy livestock at posted stockyards must register as dealers, was a final order imposing a new obligation on such employees, and hence reviewable. The Government had contended that the regulation imposed no obligations on packer-buyers not imposed by the Packers and Stockyards Act itself. The court declared, however, that it must consider the factual situation which had existed for about 20 years, by virtue of the established policy of the Secretary, rather than the situation which would have existed if he had enforced the Act as written during that period of time. The administrative construction thus placed upon the Act by the agency charged with its administration may or may not have been justified. But nevertheless it was the construction deliberately adopted and openly relied upon by the Secretary, and correlatively relied upon by the public, including the packer-buyers. During that period there was actually no obligation to register enforced against packer-buyers. In holding review available, the court repeats the liberal test articulated in the already-cited *Columbia Broadcasting System* case, a test which was honored in the breach by the prior cases: "The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." *Id.* at 265.

An ICC order granting carrier status to a company and approving the issuance of new preferred stock by it was held reviewable in *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (S. D. N. Y. 1956). The governing test, said the court, is that enunciated in *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125 (1939). *Rochester* held that, when an administrative order causes a plaintiff some individual harm, he may seek review of the administrative action in the courts, but that, until the administrative action causes

such harm, no review is possible, since the suit would ask "review of interim steps in a proceeding" and would therefore be premature. Although the plaintiffs (who were common stockholders in the company concerned) perhaps suffered no injury from the ICC order granting the company carrier status, they were surely threatened with serious harm by the second order approving the issuance of the new preferred stock. Thus, while the status order, by itself, may not have been reviewable, nevertheless, once the ICC made its order approving the issuance of the new preferred, there arose a right to seek review of the preferred stock order and also of the status order on which the preferred stock order was based.

Another ICC act was held reviewable in *Garden City Floral* v. *United States,* 143 F. Supp. 609 (D. Mont. 1956). At issue there was a Commission so-called "report". The report was issued in proceedings initiated before the Commission by petition filed by Railway Express Agency, Inc., seeking an investigation as to whether intrastate rates and charges on express traffic within the State of Montana were such as to cause an undue, unreasonable, or unjust discrimination against interstate commerce contrary to the provisions of the Interstate Commerce Act, in that such intrastate rates were not contributing their fair share of the revenues required by the Express Agency to enable it to render adequate and efficient express service. The report found and determined that the intrastate rates within the State of Montana were abnormally low and insufficient to cover the full cost of the service; that they were not contributing their fair share of the revenues required to enable the rendition of adequate and efficient express service; that this imposed an undue burden on interstate commerce and caused unjust discrimination against such commerce in violation of that section of the Act; and that rates and charges on intrastate traffic increased to the same extent as was authorized by the Commission on interstate traffic would remove the unjust discrimination against interstate commerce which the Commission found to exist. The final paragraph of the report provided: "An order requiring the establishment of tariff changes in accordance with the findings herein made will be entered unless we are informed by the Board of Railroad Commissioners of the State of Montana within 30 days from the day of service of this report that changes as contemplated by these findings will be permitted." The ICC contended that what plaintiff sought to challenge was not a final reviewable order; the report, it said, was a mere tentative determination, interlocutory in character, and it was not a coercive order commanding that the rates be increased by a certain date.

The court rejected this claim, holding the report reviewable under *Frozen Food Exp.* v. *United States, supra,* p. 89. The ICC report and determination, said the court, has an immediate and practical impact on carriers who are transporting the commodities, and the shippers as well. The "order" of the Commission operates to bring about consequences which are not

conjectural and which will have a real impact upon the plaintiff shipper. Without the injunction here prayed for plaintiff will have to pay the increased rates and that will be the consequence solely of the Commission's action. It must have been within the contemplation of Congress that a determination by the Commission that certain intrastate rates would not contribute their fair share of the revenues required for adequate service and are imposing an undue burden upon interstate commerce should at some time be subject to review by the courts. If this "order" be not presently reviewable it is difficult to perceive when it would become reviewable. The agency action taken in the Commission's report is final because it is not in a true sense preliminary to any other action which will ever be taken but is immediately and fully operative in its impact on both shipper and carrier.

Standing.—As already noted, *supra,* p. 89, the Supreme Court in 1956 took a liberal attitude toward the requirement of standing. This posture of the highest tribunal found its counterpart in several lower court decisions. Most significant of these is *Atcheson, Topeka & Santa Fe Ry.* v. *Summerfield,* 229 F. 2d 777 (D. C. Cir. 1955). It involved an action by railroads against the Postmaster General for a declaratory judgment and injunctive relief against an experimental program of carrying ordinary first class mail by air. The defendant contended that the railroads had no standing to sue, that is, that they had no right to initiate judicial inquiry into the legality of his action. He argued that the statutes bestowed on the railroads only a right to reasonable compensation for services actually performed; they gave the railroads no right to perform these services; but the lawsuit sought to protect a right to perform. Further, the Postmaster General said, the plaintiffs had no common-law right to contest his action, since they were merely competitors of the airlines within the rule laid down in such cases as *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938).

The court rejected the defendant's contentions. The relevant statute, said it, requires common carriers to carry mail. The statute imposes substantial obligations on the railroads. Under its terms they have been compelled to make substantial investments in special equipment for handling and carrying the mails. A necessary effect of the Postmaster General's action in tendering three-cent mail for transportation by air is to prevent useful employment of parts of these very considerable investments. Thus, contrary to the contentions of the Postmaster General, more is at stake than a simple statutory privilege of doing business with the Government. The interest of the plaintiff railroads is not a mere expectancy of continued patronage. It is a present interest stemming from substantial investments in cars and equipment. Such an interest may merit legal consideration even when the investment is made freely and with knowledge of a possible change of status that would impair its use. If so, it is sufficient here for the railroads did not acquire these facilities as merely useful or needed in

obtaining Government business; they acquired the equipment because they were commanded to do so by law.

Nor could the contested action of the Postmaster General be viewed only as creating competition for the railroads. The air carriers and the railroads do not bid for the mail as free competitors. They transport it as agents of the United States, subject to minute regulation by the Postmaster General. Furthermore, the Postmaster General did not simply finance or create new competition; he explicitly discontinued the use of certain railroad equipment. If the program is invalid for want of statutory authority the plaintiff railroads have been injured by a direct illegal act. The situations presented in cases like *Alabama Power Co.* v. *Ickes* were wholly different, and such cases do not apply. The plaintiff railroads have standing in court to challenge the alleged illegal act.

City of Pittsburgh v. *FPC,* 237 F. 2d 741 (D. C. Cir. 1956), is equally noteworthy. It arose out of a proceeding to review an FPC order granting a certificate of public convenience and necessity which authorized the abandonment of a pipeline as a natural gas pipeline. The Commission attacked the standing of petitioners, who were operators of barges carrying petroleum products in competition with the new line authorized and the City of Pittsburgh whose residents consumed natural gas. The court upheld the standing of both the barge operators and the city. The case is the most recent in the line of lower federal court decisions taking a liberal approach to standing. In the court's view, aggrievement, within the meaning of review statutes, is a status conferred by Congress upon a party who, though he may have no interests that must be considered in the administrative determination, is likely to suffer injury by that determination. He may be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal. It does not matter whether competitive injury to the barge operators is, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the Commission must weigh. The City of Pittsburgh, was not, like the barge operators vested with the standing of a competitor, but with that of a consumer. Where the city and its residents were consumers of natural gas delivered through a pipeline and where the gas transmission company's contemplated substitution of another existing pipeline for it for gas transmission and conversion of the first to petroleum products would have the effect of preventing cheap expansion when greater demand for gas arose, the city had standing to seek review of the Commission's order though the order merely authorized the abandonment of the one line as a gas pipeline and did not require the conversion.

Another case where the standing of petitioners was upheld is *Granik* v. *FCC,* 234 F. 2d 682 (D. C. Cir. 1956). The court there held that protestants, who had an option to buy a radio station from its

owner and to obtain an assignment of its license, were "parties in interest", "persons aggrieved" or "persons whose interests were adversely affected" by the action of the Federal Communications Commission in granting, without hearing, the owner's application to assign his radio license to a third party, since the action of Commission amounted to approval of the transfer of the license to the third party. In the court's view the meaning of "party in interest" and "person aggrieved or whose interests are adversely affected" is broad enough to include appellants in the novel circumstances here presented. They have a tangible, substantial and particular interest in the subject matter of the Commission proceedings.

See also *Garden City Floral* v. *United States,* 143 F. Supp. 609 (D. Mont. 1956), upholding the standing of a shipper to bring an action to set aside an ICC order raising intrastate rates.

A more narrow approach to the subject of standing, on the other hand, is to be found in *Benson* v. *Schofield,* 236 F. 2d 719 (D. C. Cir. 1956). It arose out of an action by officials of a voluntary association of milk producers for an injunction to restrain the Secretary of Agriculture from promulgating or making effective that part of his proposed order which would extend the limits of the Greater Boston Marketing Area to reach and include milk distributed and sold in certain named towns. The court held that the plaintiff-appellees did not have standing. To have standing, said the court, they must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. Mere loss of income in consequence of the action of Government or economic disadvantage, by itself, constitutes *damnum absque injuria* which does not confer standing. Absent justiciable individual rights, the detriment complained of is *damnum absque injuria.* In short, declares the court, the public interest is paramount. Here the Secretary has made the public interest findings contemplated by the Act. Even consumers as such have only a general interest in the execution of the law, and the proposed order by the very terms of the Act is not to be applicable to any producer in his capacity as such. Since it is clear that Congress has not intended to create a statutory privilege protected by judicial remedies, appellees lack a legal right. In the court's view, they have demonstrated no legal wrong.

There is, in the opinion, a clear confusion between the question of standing and that of the validity of the challenged agency action on the merits. The question of public interest, emphasized by the court, goes to the merits. It has nothing to do with standing, which depends on whether petitioners have demonstrated a direct, personal interest in the act they are challenging. To assert that producers do not have such an interest in the Secretary's order is unwarranted, particularly in the light of *Stark* v. *Wickard,* 321 U. S. 288 (1944), which, one would have thought, clearly upheld the standing of producers in such a case.

In *Home Gas Co.* v. *FPC,* 231 F. 2d 253 (D. C. Cir. 1956), also, a narrow approach

to the question of standing was followed. The court there held that, in determining whether a present gas line supplier would be aggrieved by an order directing another corporation to serve natural gas in an area already being served by petitioner, the factor of public interest would be considered, and where an additional supplier would provide advantages for the consumer in making gas available at a cheaper rate, providing protection against failure due to line breakage, and permit development of markets in additional territory, the petitioner would not be considered aggrieved. As in the prior case, there is a tendency in the opinion to confuse the question of whether petitioner is aggrieved (*i.e.,* the question of standing) with that of whether it is entitled to prevail on the merits. Insofar as the court holds that petitioner is not aggrieved by the grant of a license to a competitor, its decision is both unreal and contrary to much of the case-law. It is recognized that there are cases denying the standing of a competitor. See, *e.g.,* 8 Ad. L. Bull. 75. To hold that a competitor is not aggrieved in such a case is, however, to rely on the kind of formalistic fiction that has so often brought the law into disrepute. Particularly since the Administrative Procedure Act, is a narrow approach to standing out of place. The APA should induce courts like the instant one to modify their rigid attitude, in view of its manifestation of a Congressional will to make access to the courts available on the widest possible basis. In a dissent in the already discussed *Storer* case, *supra,* p. 89, Justice Frankfurter, referring to the law of standing, stated, "To the laity such matters may seem technicalities in a derogatory sense of the term." 351 U. S. at 214. It may surprise the learned judge to discover that such feeling with regard to a narrow approach to standing is not confined to men technically ignorant in the mysteries of the law. Competent jurists, too, hold the view that our courts have been overly influenced by technical niceties in its handling of the question of standing. The courts, in holding, as they sometimes do, that someone like a competitor or a consumer has no standing, have lost sight of the overriding need in our system—to make sure that someone shall in fact be able to secure review of administrative action. It is only if this need is satisfied that the principle of administrative legality can truly be enforced. It is in the interest of the community as a whole that illegal agency action be not left untouched. It is for the judiciary to vindicate this interest by ensuring that there are no unnecessary obstacles in the path of those seeking to challenge the legality of administrative action. To construe the standing requirement as our courts sometimes do is to place an unnecessary obstruction on the road of justice.

Parties Defendant. — Despite *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), 8 Ad. L. Bull. 49, the question of proper parties defendant in immigration cases continues to come before the courts. In *Ceballos* v. *Shaughnessy,* 229 F. 2d 592 (2d Cir. 1956), the court held that there was a distinction between a case involving a challenge to deportability (as was pre-

sented in *Pedreiro*) and one involving a claim that, notwithstanding deportability, the Attorney General should exercise his discretion in favor of the issuance of an order suspending deportation. In the latter case, says the court, the Attorney General or the Commissioner of Immigration is still an indispensable party. One wonders, however, whether the asserted distinction is valid, in view of the extremely liberal language of the Supreme Court's opinion in the *Pedreiro* case. Actually, all that was said in *Pedreiro* (particularly by Judge Medina, who delivered the instant opinion, when that case was before the court of appeals) applies with equal force here. See 8 Ad. L. Bull. 50; 7 Ad. L. Bull. 77.

See *Lezos* v. *Landon,* 235 F. 2d 581 (9th Cir. 1955), for a holding similar to that in the *Ceballos* case.

Scope of Review.—The narrowness of review in the federal courts is illustrated again in *Ferenz* v. *Folsom,* 237 F. 2d 46 (3d Cir. 1956). It arose out of a claim by a widow under the Social Security Act. The referee had found that she was not "living with" the husband at the time of his death as required by the Act. The district court reversed his ruling on the ground that, since a reconciliation had been effected between the parties, they were living together for the purposes of the Act. The court did this on its view of the intent of Congress. Yet, though its action was thus based upon its interpretation of the statutory language, the court of appeals reversed. According to it, the district court had misconceived the extent of its review power. "The reviewing authority of the District Court is not unlimited, for it may not substitute its inferences for those of the referee which are supported by substantial evidence. * * * In finding that there had been a reconciliation the District Court ignored the referee's inferences without finding that they were not supported by substantial evidence. It is well-settled that we must reverse the order of the District Court if upon review of the record as a whole we find that the referee's findings were supported by substantial evidence." *Id.* at 49. In the court's view, the district court exceeded the authority granted by the Act in substituting its own inferences for those it was bound to accept.

The relatively narrow scope of review in the federal courts has led at least one federal judge to vigorous dissent. In *Contract Battery Mfg. Co.* v. *NLRB,* 229 F. 2d 354 (5th Cir. 1956), the majority of the court enforced a Board order, holding that the question, "Are the findings of the board with respect to questions of fact supported by substantial evidence on the record considered as a whole?", should be answered in the affirmative, indeed could not be properly answered any other way. This was not to say that petitioner did not present evidence to the contrary of that offered by the general counsel or that if the examiner had discredited Wallace (the main witness for the Board) and some of the other witnesses he could not, and ought not, to have found differently. According to Judge Cameron, who dissented, on the other hand, the testimony of Wal-

lace was "simply unbelievable". In such a case, said he, the courts need not accept an NLRB finding based upon such testimony. He refers with approval to the concurring opinion of Judge Waller in *NLRB* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (5th Cir. 1947), in which he decried the tendency of courts to abdicate in favor of administrative functionaries,—"a reading of which opinion tends definitely to buoy up the spirits of those tempted to look with despair upon their encroachment upon the judicial prerogative". Judge Cameron closed his dissent with the following quote from Judge Waller's earlier opinion: "A finding by an examiner, whether arrived at carefully and skillfully, or through incredible credulity, or simple stultification, should be deemed prima facie correct but should never be substituted in place of the power which the people in their Constitution solemnly and surely committed to their courts." 229 F. 2d at 357.

Lack of Evidence.—Petition of Gee Nay Wai, 135 F. Supp. 641 (N. D. Cal. 1955), was a habeas corpus proceeding to review the decisions of an Immigration Board of Special Inquiry and the Board of Immigration Appeals denying petitioners' claim for recognition of their citizenship as foreign-born children of a United States citizen. The administrative decisions were based upon the following discrepancies in petitioners' testimony, during a prolonged interview: (1) whether one or two taxicabs were used in transporting the petitioners, their friends and baggage to the dock in Hong Kong when they sailed for the United States; (2) whether there were two or three movable ladders around their house in the home village; and, (3) whether electric lights or kerosene lamps were used in the quarters which they occupied temporarily in Hong Kong before proceeding to the United States. The court held that the agency action based on such trivial conflicts in testimony was really based on no evidence and hence arbitrary. Without failing to give due weight to the findings of the administrative agencies, the courts have consistently reversed the findings of the immigration authorities when the grounds of the immigration boards' decision were minor discrepancies in the course of a lengthy record of testimony. The courts have also taken into consideration the scope and detail of the examination which developed discrepancies in testimony; the proximity or remoteness of the issue upon which a discrepancy was developed to the issue of the disputed relationship; the number of witnesses in substantial agreement as to matters in the record as a whole, aside from the issues upon which discrepancies develop; the period of time over which the relationship has been asserted in other proceedings or records than the immediate hearing to determine the relationship; and last of all, but by no means least, a measure of common sense.

Mixed Questions.—The Supreme Court's decision in *East Texas Motor Freight Lines* v. *Frozen Food Express, supra,* p. 92, has led a district court to reverse an ICC order which prohibited plaintiff carrier from transporting raw shelled nuts

without a certificate of public convenience and necessity. The Commission found that the raw shelled nuts referred to were manufactured products of agricultural commodities and that Consolidated might not transport them without first obtaining a certificate of public convenience and necessity from the Commission. According to the district court, the case at bar, like the *East Texas Lines* case, involves more than a mere determination of whether the findings of the Commission are correct. The question presented is one of mixed law and fact. The court said it could not agree with the Commission's contentions that the raw shelled nuts were manufactured products of agricultural commodities. The Supreme Court in its *East Texas Lines* decision emphasized the fact that the farmer won a victory in Congress by the enactment of the relevant statutory provision and that the enactment was recognition of the fact that the price obtained by the farmer for his product is greatly affected by the cost of transporting it to the market whether in its raw state or after it has become marketable by incidental processing. True, the raw shelled nuts can be shipped at a lower cost but that has nothing to do with its continuing substantial identity to a raw unshelled nut. Moreover, the raw shelled nut frequently remains viable, a living seed. Seemingly it suffers no substantial change by the divestiture of its natural outer covering, essential for its growth but, insofar as mankind is concerned, serving no other purpose. Indeed the husk or shell, when removed, has little value, for it can be used only as fertilizer or as feed for livestock. If an eviscerated chicken retains a substantial identity to a chicken in the pen, it must be said that a raw shelled nut is substantially identical to a raw unshelled nut. The court concluded that the raw shelled nuts are not manufactured products within the terms of the statute. *Consolidated Truck Service* v. *United States,* 144 F. Supp. 814 (D. N. J. 1956).

Jurisdictional Fact.—Frausto v. *Brownell,* 140 F. Supp. 660 (S. D. Cal. 1956), contains a strong reaffirmation of the rule that an individual has a right to a full judicial determination of whether he is a citizen. The doctrine of limited scope of review will not govern review of the administrative determination that he is an alien. And, according to the court, it makes no difference whether the question is raised in deportation or exclusion. Once again we see the doctrine of full review of *jurisdictional* facts applied in the immigration field, despite the oft-repeated assertion that that doctrine is dead in the federal courts. *N.B.*—The court's assertion that there should be full review in an exclusion, as in a deportation, case is contrary to the oft-criticized holding of *United States* v. *Ju Toy,* 198 U. S. 253 (1905). One wonders, however, whether *Ju Toy* itself is not out of line with more recent conceptions of administrative law and the need for judicial control.

The rule normally followed by the federal courts on review of jurisdictional facts is shown by *Smith* v. *Belair,* 135 F. Supp. 861 (D. Mass. 1955). It was a proceeding to review two compensation orders. At

issue was the finding of the deputy commissioner that deceased was a member of the crew of a vessel at the time of his death and was therefore outside the coverage of the Longshoremen's and Harbor Workers' Compensation Act. This was clearly a fact upon which administrative jurisdiction under the statute depended. Because of this plaintiffs contended that the court should make an independent and *de novo* scrutiny of the issue. The court rejected this contention, stating that inasmuch as the deputy commissioner could reasonably have concluded upon the record as a whole that the decedent was a member of the crew, the court could not set aside that determination and make its own finding *de novo*. The jurisdictional fact is, in other words, treated like any other fact, for the purpose of determining the proper scope of review.

Stare Decisis on Review.—The interesting question of how far a reviewing court should be bound by stare decisis was presented in *United States ex rel. Fong Foo* v. *Shaughnessy,* 234 F. 2d 715 (2d Cir. 1955). It was a proceeding by a Chinese alien for a stay of deportation. Petitioner had been known to have allied himself with the Formosa Government. Nonetheless, the immigration authorities had decided that he would not be subject to physical persecution if deported to the mainland of China and had refused a stay of deportation. The court held that the agency action here was arbitrary and capricious, and, interestingly enough, it did so on the basis of judicial notice. Says Judge Frank: "The Attorney General, by his subordinate, found as a fact that appellant would not be 'subject to physical persecution' by the Chinese Communist Government. I think we can and should take judicial notice of the notorious and virtually indisputable fact—almost uniformly reported in all pertinent accounts—of the ruthless behavior of the Communist governments in China and Russia, so that almost surely a Chinese, known to have allied himself with the Formosa Government, will be tortured and exterminated if found on the mainland of China. Illegal entry into this country should not be punished by death." *Id.* at 718.

The Government asserted, however, that the court should be bound by a prior case on similar facts where, a few years ago, it had refused to annul such agency action. The court asserted, all the same, that stare decisis should not govern in such a review proceeding, where a man's life was involved. Especially should that be the case when the Government cites a precedent embodying an unjust ruling adverse to the appellant. For the Government is not in the position of a businessman who has purchased property, or incurred a business risk, in reliance on a judicial precedent. Rather is the Government like one who objects to a change in a substantive rule relative to negligence or a procedural rule of evidence or practice; as to such rules, stare decisis has relatively little vigor.

Subpoenas.—There is a good statement of the rules which should govern proceedings to enforce agency subpoenas in the courts in *Hermann* v. *CAB,* 237 F. 2d 359 (9th Cir. 1956). Said Judge Fee there: "It is well settled that, when a petition for the enforcement of an administrative

proceeding is filed in a federal court, it initiates a case or controversy under the Constitution. In order to have the subpoena enforced, the issue as to whether each of the documents subpoenaed is relevant and material is a judicial question which must be passed upon by the court. There are no presumptions that the administrative agency or the hearing officer has subpoenaed only those documents which are relevant and material. These are questions which are judicial and to which the expert facility of the administrative body obviously does not apply. When the trial court said that, comparing the allegations of the complaint with the demands of the subpoenas, he could not say that any of the documents were irrelevant or immaterial to the proceedings, he failed to pass upon the judicial question presented to him in the case." *Id.* at 363.

Nor was the trial court correct in holding that he was not required to consider relevance and materiality at this stage of the proceedings. The court had no other case or controversy before it except the one which related to the question of whether the documents should or should not be produced. This is entirely unlike a civil case in court between two adversary parties, one of whom under the rules of the court has had a subpoena duces tecum issued to the other. To prevent oppression, the court should require that only material and relevant documents be demanded. As Judge Fee puts it, the agency "should have considerable leeway in order not to hamper its functions, which are highly important in the structure of government. But, on the other hand, the court should not be required to rubberstamp with approval the administrative subpoenas. Such an action would constitute the Board the final judges of the materiality and relevancy of each document subpoenaed. It is hornbook law that they have no such authority or function."

NLRB v. *Duval Jewelry Co.,* 141 F. Supp. 860 (S. D. Fla. 1956), is one of the rare recent cases refusing to enforce an agency subpoena. Two grounds are given by the court. In the first place, says it, from the face of the subpoenas it is clear that they are unreasonable, burdensome, and oppressive. They were issued on the 30th day of December, 1955, and directed to persons in Jacksonville, Florida. They required the production of voluminous books and records essential in the operation of the respondents' businesses, on the 10th day of January, 1956, at a representation hearing in Miami, Florida, located some 350 miles from Jacksonville, Florida. The extreme shortness of time within which the respondents had to gather and produce their many records becomes quite apparent when it is appreciated that not only is the gathering of the records time-consuming, but in addition a great deal of time would be required by the respondents to copy certain essential parts of the subpoenaed records in order that their respective businesses would not suffer because of the absence of the books and records. Subpoenas duces tecum requiring the production of books and records should provide ample time for the business to prepare for the absence of those books

and records. Patently no such time was provided herein.

Even more serious, says the court, is the Board's misconstruction of the statute, which provides: "* * * The Board, or any member thereof, shall upon application of any party to such proceedings (representation hearings or unfair labor practice hearings), forthwith issue to such *party* subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. * * *" (Emphasis supplied.)

In the court's view, nowhere does Congress place any new meaning on the term "party" as used in the statute; but the Labor Board in its Rules and Regulations attempts to originate a new concept in Anglo-American jurisprudence by attempting to make its regional directors a "party" in all proceedings in their respective regions. Congress nowhere has given the Board the power to enlarge by rule-making the clear-meaning terms employed in the statute in question, nor does the statute contemplate any "Board" actions except to enforce the Board's findings. Nowhere in the common law is there any basis for a construction of the word "party" to include persons directly associated with the "disinterested" tribunal before which tribunal both sides (here union and management) in an adversary proceeding are submitting, or are about to submit, the causes. The term "party" does have a universally accepted meaning and the attempt of the Board (the tribunal) to enlarge that meaning by rule to include its regional directors is, in the court's opinion, a nullity.

One may sympathize with the court's attempt to limit the agency subpoena power —a power which all know is capable of such oppressive use. All the same, one wonders if the Board has distorted the Congressional intent as much as the court thinks. In NLRB cases, the Board is, in fact, a "party" as well as the deciding tribunal. To hold that the Board cannot issue subpoenas to its regional directors is to take an important step in the direction of defeating effective administration of the labor law.

A case where an agency subpoena was enforced, despite the claim that it sought records not within the scope of the particular Act and irrelevant to the investigation in question is *Woerth* v. *United States,* 231 F. 2d 822 (8th Cir. 1956). The court there held that where a registered livestock dealer, who was also engaged in the local business of dealing in and with cattle, maintained a separate account to which he had transferred cattle purchased at stockyards and disposed of in alleged off-market operations, such special account was relevant to investigation of his activities as a dealer, under the Packers and Stockyards Act, and an order, granting the Secretary of Agriculture enforcement of an investigatory subpoena duces tecum, properly included such special account. It may be, said the court, adopting the reasoning of the district court on this point, that the records requested pertain to transactions not within the scope of the Act and which are irrelevant to the investigation in question. How-

ever, the fact that the respondent may have intermingled irrelevant information in the records in question cannot serve to defeat the right of the Secretary to examine those records as to transactions which had their origin in the activities of the respondent as a registered dealer. The subpoena duces tecum in question is not couched in broad and sweeping language. It does not call for indefinite records or a mass of records. It is very specific and limited in its terms. The production of the records called for by the subpoena duces tecum would not disrupt or interfere with the respondent's business activities or place an undue burden on him or cause hardship to him. The investigation in question is one authorized by Congress. It is for a purpose within the power of Congress to authorize. The subpoena duces tecum in question was issued for the purpose of making such an investigation and calls for the production of records which are apparently relevant thereto.

United States v. *Zuskar,* 237 F. 2d 528 (7th Cir. 1956), arose out of proceedings by the United States to compel two naturalized citizens to testify before Immigration and Naturalization Service investigators concerning two other named persons. One of the defendants claimed that he himself might be the subject of inquiry by the Service and that hence, under the Supreme Court's decision in *United States* v. *Minker,* supra p. 88, his testimony could not be compelled. The court held that defendant's claim was invalid. According to it, the case has only a superficial resemblance to *Minker* which is suggested solely by defendant's argument, and which evaporates for want of some evidence to give it substance. The court states it could only follow *Minker* "by ignoring critical factual disparities between that case and Zuskar's. All this record discloses is an attempt to compel appearance and testimony of a recalcitrant *witness.* If there is a subterfuge lurking in the Director's subpoena the defendant has done little to reveal it other than urge that his appearance and testimony might turn the tables on him. Our business is with facts. Indeed by that line of argument Zuskar virtually concedes he is only a *witness,* but one fearful of potentialities." 237 F. 2d at 532. To interpret *Minker* as defendant contends would, in effect, amend the statute so that "witness" must read as meaning only citizens, since every alien is a potential subject of inquiry by the Immigration Service.

Compare *FTC* v. *Menzies,* 145 F. Supp. 164 (D. Md. 1956) and *FTC* v. *Rubin,* 145 F. Supp. 171 (S. D. N. Y. 1956), reaching opposite results on the question of whether the Commission's subpoena power under the Federal Trade Commission Act might be used in proceedings to enforce the Clayton Act.

CHANGE OF POLICY.—*Optical Workers' Union* v. *NLRB,* 227 F. 2d 687 (5th Cir. 1955), involves an interesting variation of the problem presented in the famous second *Chenery* case, 332 U. S. 194 (1947). It grew out of a petition by a union before the NLRB for certification as a bargaining agent and a complaint against the employer for unfair labor practices. Under the jurisdictional limitations promulgated

by the Board then in force, the employer was engaged in commerce to an extent sufficient to give the Board jurisdiction. The trial examiner found that the employer came within the Board's jurisdiction and recommended an order against the employer. While the examiner's report was awaiting action by the Board, the Board promulgated new jurisdictional limitations and, when the case came before it, reversed the examiner because the employer's volume of business did not satisfy the new standards. The complaining union appealed urging that the Board, while having the authority to decline jurisdiction over particular labor disputes on a case-by-case basis, cannot adopt a rule "legislating" a substantial number of employees and employers out of the administration of the Act. They also argued that it cannot be applied retroactively, because, as they say, the trial examiner's finding that the employer was engaged in commerce within the meaning of the Act established NLRB jurisdiction as the law of the case.

The court starts its opinion with an interesting discussion of some of the broader administrative-law problems underlying the case. At the outset, says Judge Tuttle, the objections stem from a view of the Board's powers and functions as legislative and judicial, or quasi-legislative and quasi-judicial, in character. These analogies, however, while they have been at times useful and convenient in explaining the law relative to administrative agencies, are not always valid or true to the fundamental principles which they are intended to serve. It is true, the learned judge goes on, that some agencies, whose histories extend back to the early development of administrative law in this country, have had their powers and functions molded by decisional law into forms resembling the leading available models at the time, i.e., courts and legislatures. This mode of analysis did not prevail without well-reasoned dissent, however, and administrative agencies created under the later law were not given a judicial construction of their powers so closely simulated to these older forms.

The second *Chenery* case, says the court, gives us strong reason for shedding the confining analogies above adverted to. The Labor Relations Board, even before the Taft-Hartley amendments gave it the task of policing a whole new set of unfair labor practices, was never able to assume its full jurisdiction. Before 1950, its declinations of jurisdiction were avowedly on a case-by-case basis, and even the petitioners admit that this was within the Board's discretion. However, while these decisions were not made pursuant to any announced policy, they followed a course that all who were interested could soon easily predict. What the petitioners here complain of, therefore, is that the Board now acts under an announced policy, rather than a presumed policy, and that it has applied this policy retroactively to them, overturning "the law of the case." In accordance with the *Chenery* case, the Board has authority to adopt and reverse policy, either in the form of an individual decision or as rule-making for the future, in any manner reasonably calculated to carry out its statutory duties, without regard to whether

such action strictly conforms to the rules applicable to courts or legislative bodies. Therefore, finding, as the court does, that the standards adopted by the Board are reasonable, it can discern no valid distinction between a decision made under these criteria and one made under the former announced policy. Furthermore, there is no sound reason why standards cannot be applied retroactively, as here, or prospectively. The trial examiner's finding that the employer was engaged in commerce within the meaning of the Act did not bind the Board as the law of the case, for that concept, also, has no place in circumscribing the Board's action.

Res judicata.—In *Panhandle Eastern Pipe Line Co.* v. *FPC*, 236 F. 2d 606 (3d Cir. 1956), it was claimed that the Commission had improperly imposed the rule of res judicata. In it, a pipeline company initiated a second rate proceeding only seventy five days after decision of the Commission in a prior proceeding. The company was not denied a hearing on the merits of any issues which had once been decided against it, and, on a motion to dismiss, the Commission concluded that certain claims and justifications presented by the company were addressed to but not persuasive upon issues it had recently considered and decided in the other rate case, and accordingly elected to be guided by those rulings.

According to the court, there was not here an improper use of res judicata. When a tribunal disposes of an issue as res judicata, it invokes a rule of law to make a prior decision binding on a litigant and to deny him another hearing on the previously decided matter. But when a tribunal permits a party to make whatever showing and justification he will on the merits of an issue and, that showing considered, concludes that it will adhere to its own earlier decision on substantially the same point, res judicata has not been invoked. It is clear, says the court, that the latter course was followed here. The company was not denied a hearing on the merits of any issues which had once been decided against it. Rather, it was permitted to present its entire case in chief. Thereafter, on motion to dismiss, the Commission concluded that certain claims and justifications presented by the company here were addressed to but not persuasive upon issues it had recently considered and decided in other rate cases. Accordingly, the Commission elected to be guided by those rulings. At most the Commission was undertaking to follow its own recent and considered exercise of judgment and to make its successive rulings exhibit continuity and consistency. This is quite different from imposing a rule of res judicata upon a litigant. This case, the court concluded, presents no issue of the propriety of res judicata in administrative proceedings. And, said the court, res judicata aside, it certainly is not arbitrary for an administrative agency to be guided by its own prior exercise of expert judgment as reflected in its recent decisions.

Another case involving the same parties where the doctrine of res judicata was said to be at issue is *Panhandle Eastern Pipe Line Co.* v. *FPC*, 236 F. 2d 289 (3d Cir.

1956). There the company sought review of an FPC order which denied its application to reduce its natural gas service to a Michigan gas company. In 1947, the Commission had authorized the partial abandonment of the service in question (though, at that time, such abandonment had been opposed by the company.) Now the company argued that the earlier proceedings must be given effect in the instant proceeding upon principles of res judicata. According to the court, however, the doctrine of res judicata can have no application to a proceeding, such as this, which involves a determination of the present or future public convenience or necessity with respect to the continuance or abandonment of natural gas service. In a situation such as this the Commission is exercising delegated legislative power to make a rule to guide the conduct of the parties in the future. It is not exercising quasi-judicial power to determine past or present rights or liabilities.

Another case involving applicability of res judicata is *Mannerfrid* v. *Brownell,* 145 F. Supp. 55 (D. C. 1956). The court there held that an alien was deportable where he had claimed draft exemption in 1943 and had illegally reentered the country in 1949. This was true although the Government had admitted him in 1949 for permanent residence and he had subsequently left and reentered on similar re-entry permits on numerous occasions thereafter. According to the court, a re-determination of plaintiff's 1949 admission cannot be held to have been foreclosed to the government under the doctrine of judicial res judicata. The doctrines of administrative res judicata or the law of the case afford plaintiff no relief. In contemplation of law, if plaintiff was not entitled to be admitted legally in 1949, no law of the case or estoppel can be asserted as a defense against the sovereignty of the United States. It cannot properly be said that plaintiff acquired a technical right to remain in the United States, regardless of the equities attaching to his particular case.

ESTOPPEL.—*United States* v. *Bonderer,* 139 F. Supp. 391 (W. D. Mo. 1956), involved an action by the Government to recover a wheat marketing quota penalty. The court held that defendant farmer's reliance upon statements made by the Secretary of Agriculture or other public officials, concerning the propriety of increasing wheat acreage to produce feed in drought areas was no defense in an action for the penalty for exceeding defendant's quota. The court recognized that during the time in controversy herein, there was a severe drought in the area in which the defendant resides, and that feed for livestock presented a serious problem. However, since the court is bound by the law, it must be taken as written and interpreted accordingly. It must be realized, declares the opinion, that the Secretary of Agriculture and other high public officials cannot set aside or avoid the consequences of the Acts of Congress except in the manner provided in such Acts. Thus, even though defendant may well have relied upon statements made by the Secretary, or other public officials, such reliance will not serve as a defense to this action. This is all very well

and doubtless states the law on the subject. All the same, one may be thankful that he is not in the position of the farmer, untutored in legal niceties, who was led by the Secretary of Agriculture to believe he was performing a patriotic service in exceeding his quota.

AGENCY RACIAL DISCRIMINATION.—*United States ex rel. Lee Kum Hoy* v. *Shaughnessy,* 237 F. 2d 307 (2d Cir. 1956), upholds the practice of the Immigration and Naturalization Service in giving blood tests to foreign born Chinese claiming derivative citizenship, even though such tests were not given to those of other than Chinese racial origins. It had been claimed that such singling out of those of Chinese descent constituted an unconstitutional racial discrimination by the agency concerned. But the court rejected this claim, holding that the finding of the district court that the testing of these relators was actuated by racial discrimination, was not warranted. It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese case or of Chinese admitted without blood testing. Nevertheless it is more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of different cases.

To one who has available only the published report of the case, it is difficult not to agree with Judge Frank, who delivered a vigorous dissent. If, on the facts shown, at least a *prima facie* case of discrimination was not made out, it is hard to see how such a case can ever be proven. Undisputed was the fact that blood tests were required only of those of a particular racial origin. "It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person had been subjected to a blood test or a Chinese excused from one." *Id.* at 313. Under *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886), such application by an agency of even a concededly valid statute is unconstitutional. As the highest Court said there: "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Id.* at 373-4.

STATE CASES

ADMINISTRATIVE OR JUDICIAL?—One of the questions that has much concerned students of administrative law is that of the differ-

ence between an administrative agency and a court. Yet, unlike many questions that agitate theorists, the matter has important practical connotations. This is well illustrated by the New York case of *Matter of Klein,* 131 N. E. 2d 888 (N. Y. 1956). It involved an appeal to the Court of Appeals of that State from affirmance of an order directing appellant to appear for examination as a witness in an "action" pending in the Superior Court of New Jersey and directing him to produce books, records, and accounts. The case arose out of an investigation begun into the financial affairs of a New Jersey municipality, including alleged corruption in the awarding of the garbage removal contract to appellant's company. The Superior Court of New Jersey, pursuant to statute, appointed respondent, an attorney, as "Expert" to take the testimony concerning the alleged municipal corruption. Respondent applied to a New York court for a subpoena directing appellant to appear and produce books and records. Under the relevant New York statute testimony and production of books and papers may be compelled at the suit of any party to an out-of-state "action, suit, or special proceeding." The Court of Appeals was thus confronted with the question of whether the New Jersey proceeding was an "action, suit, or special proceeding" within the meaning of this provision.

In answering this question, said Chief Judge Conway, use must be made of the test articulated by Justice Holmes in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908): "A judicial inquiry investigates, *declares and enforces* liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." (Emphasis added.) According to the chief judge, the important criteria for determining whether an inquiry is truly "judicial" are "(1) the presence of parties, (2) the trial and determination of issues, and (3) a final order or judgment of rights, duties or liabilities." In the present case, these elements were not present. The New Jersey statute does not provide for any determination of issues or for any final judgment or order. The purpose of the proceeding was investigatory, not adjudicatory. Hence it did not fall within the terms "action, suit, or special proceeding" as they are used in the New York statute.

Right to Be Heard.—*Fink* v. *Cole,* 133 N. E. 2d 691 (N. Y. 1956), involved a proceeding brought to review and set aside the denial of petitioner's application for an owner's horse racing license. Petitioner claimed that the denial was improper because, among other things, he had not been afforded any hearing. The New York Court of Appeals held, however, that that did not affect the validity of the license denial. The legislature, said the court, does not provide for a hearing procedure in connection with thoroughbred racing license applications or renewals. In such circumstances, there is no requirement for a hearing.

Of course, to say that the legislature is silent is but the first (not the only) step in determining whether there is a right to be heard prior to administrative action. Re-

gardless of whether or not the statute provides for a hearing, those adversely affected in their person or property must be heard, if administrative action is to be taken consistently with the due process clause. In such cases, it is (to paraphrase an English judge of a century ago) precisely the function of due process to supply the omission of the legislator. *Cooper* v. *Board of Works,* 14 C. B. N. S. 180, 196 (1863).

But, says the New York court in *Fink* v. *Cole,* what has just been said is true only when the administrative action at issue impinges upon personal or property *rights*; and petitioner here had no "right" to engage in horse racing. Says Judge Burke in his opinion: "The cases cited by the petitioner are not in point as they refer to statutes requiring a hearing or factual situations giving rise to a due process question because of the invasion of constitutional right. The administrative machinery, here, was created for the purpose of determining whether a privilege—a license—should be granted to citizens to engage in the business of horse racing." 133 N. E. 2d at 693.

Thus, the court's denial to petitioner of any right to what the Supreme Court has aptly termed the "fundamentals of fair play" is based upon the distinction between "rights" and "privileges." It is only when a so-called "right" is involved, that there is any constitutional right to be heard; if what is involved is termed a privilege, the private party is left stripped of procedural protections other than those expressly afforded him by the legislature. It cannot be denied that this right-privilege distinction is one that has been basic in our administrative law. All the same, one wonders whether it should any longer serve as *the* test upon which the constitutional right to be heard turns. To say that a particular occupation or calling is only a "privilege" which the legislature can prohibit altogether does not, of itself, answer the question of whether notice and hearing should be required when the job of deciding individual cases has been delegated to an administrative agency. That a privilege can be prohibited by the state does not mean that when it is not prohibited the procedure for dealing with individual cases should be other than fair. Certainly, regardless of the tag used, the effect on petitioner in *Fink* v. *Cole* is a drastic one. On the merits, he may or may not be entitled to a license; but he should have a fair hearing at which he can present his side of the case before the merits are decided. Recently, the New York court took an important step in favor of the right to be heard by holding that a taxicab driver's license was a right, not a mere privilege. *Hecht* v. *Monaghan,* 121 N. E. 2d 421 (N. Y. 1954), 8 Ad. L. Bull. 84. In *Fink* v. *Cole* it declined to take the even bolder step of refusing to base the right to be heard upon the right-privilege distinction at all.

Compare *London Sporting Club* v. *Helfand,* 152 N. Y. S. 2d 819 (Sup. Ct., N. Y. Co. 1956), where summary revocation of a boxing promoter's license was upheld, also on the ground that only a privilege was involved; *Michael* v. *Logan,* 73 N. W. 2d 714 (Iowa 1956) (same result in liquor license case).

See *McPherson* v. *Pacific Power & Light Co.*, 296 P. 2d 932 (Ore. 1956), where a hearing was held not necessary prior to a Public Utilities Commission order decreeing an emergency rate adjustment for a power company to offset the purchase because of a lack of rainfall, of an abnormally large quantity of steam-generated electric energy at a substantially higher cost than the hydro-generated energy available under normal conditions.

Right to Present Evidence.—Essential to the right to be heard is the right to present any relevant evidence that may be available. Indeed, a hearing in which full effect is not given to that right is much like a performance of *Hamlet* without the appearance of the Prince of Denmark himself. In *New York Tel. Co.* v. *Public Serv. Comm'n,* 132 N. E. 2d 847 (N. Y. 1956), the New York Court of Appeals held that the basic right to present evidence was violated. The issue there was whether or not the Commission, in a telephone rate proceeding, had erred in refusing to receive evidence offered by the telephone company of the reproduction cost less depreciation of its physical plant. Under the relevant statute, in fixing telephone rates, "the commission *shall,* with *due regard, among other things,* to a reasonable average return upon the *value* of the property *actually used* in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates." (Emphasis added.)

The company contended that the above language required the Commission to give due regard to a reasonable return upon a rate base consisting of the present value of its plant, and offered evidence as to its current reproduction cost. The Commission refused to receive such evidence, taking the position that it would use a so-called investment rate base—one based on original cost less the actual depreciation reserve—and that the language of the statute is not mandatory, or that, even if it were, it would not require the commission to accept proof of reproduction cost.

The court recognized that, under the celebrated Supreme Court decision in *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), a rate-fixing agency need not base its rates upon reproduction cost. But, said the court, the *Hope* case could not amend the New York statute already quoted. And, under it, "due regard" *must* be given to reproduction cost. This is not inconsistent with the *Hope* case. The Commission is not required to *base* its rates upon reproduction cost. But the "due regard" for such cost demanded by the statute requires some consideration of that factor. It is hard to see how it can be considered if data with regard to it are not even allowed in evidence. The Commission cannot refuse to receive such data without violating the company's right to present all relevant evidence available to it.

Counsel.—*In re Sanders,* 123 A. 2d 582 (N. J. Super. 1956), is an interesting case on the right to counsel in administrative proceedings. It arose out of a proceeding suspending certain licenses to distribute and sell cigarettes. Appellants claimed

that they were deprived of due process because they were not represented by counsel before the agency. The court found, however, that this was in pursuance of their own choice. According to the court, the right of the appellants to the aid of counsel was not an imperative and indispensable privilege the positive exercise of which by the accused the agency was obliged in the interest of justice affirmatively to require. It is a permissive right, the acceptance of which is dependent upon the voluntary desire of the accused. A *sui juris* and mentally competent accused is at liberty, as here, voluntarily to conduct his own defense and to rely on his own skill and ability without the assistance of counsel. The appellants manifestly chose this alternative. They cannot now justly grumble.

Hearing officers.—Under the Administrative Procedure Act of California, a hearing officer must preside over every contested case. In *Moyer* v. *State Board of Equalization,* 295 P. 2d 583 (Cal. App. 1956), a license suspension case, a proper hearing officer had conducted the hearing and made a proposed decision. On petition of the licensees, a reconsideration was granted. At the hearing on reconsideration, three members of the Board without a hearing officer were present. The court held that this violated the APA requirement of a hearing officer in every hearing in contested cases. According to the court, the task of the hearing officer is important to overcome the lack of procedural knowledge of a presiding lay member of the Board and his ensuing reliance on the advice of the prosecuting agency attorney. There is clearly such need for expert and impartial legal guidance also when the Board receives evidence on a hearing on reconsideration.

Rules publication.—The importance of agency publication of its rules is stressed in *Metropolitan Motors* v. *State of New Jersey,* 120 A. 2d 776 (N. J. Super. 1956). It was a license application case. Appellant asserted that it had been given no hearing. The agency head informed the court in his brief that it was the practice of his Division to grant a hearing in cases where licenses were denied, if one was requested. And he pointed out that none was asked for after this application was rejected. According to the court, however, substantial significance cannot be attached to such failure because, so far as the record shows, there is no written or recorded rule in existence designed to give notice of or call to the attention of interested members of the public that a hearing may be had, if demanded. Publication of such administrative rules, declared the court, is one of the advantageous requirements of an administrative procedure act.

Standing.—It is by now hornbook administrative law that, to maintain a review action, plaintiffs must possess standing—i.e., must have a direct, personal interest in the agency act which they challenge. It is not enough, in our system, that they put forward their interest as members of the public, vindicating the interest of the community in maintaining the rule of law. In our law, there is nothing like the *actio popularis* (popular action) of the

Roman law, which could be brought by any citizen regardless of whether he had standing, in our modern sense. In line with our law on this point is *Kaplan* v. *Bowker,* 131 N. E. 2d 372 (Mass. 1956). The court there held that petitioners, disclaiming that they had suffered any wrong peculiar to themselves, had no standing as members of the general public to maintain a petition for a writ of mandamus commanding the members of a commission established to investigate communism and subversive activities to refrain from including in its report the names of any individuals concerning whom the commission had received creditable evidence that they were communists or subversives. From an early day, said the court, it has been an established principle that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of governmental acts.

In *State* v. *Donnelly,* 285 S. W. 2d 669 (Mo. 1956), the standing of an administrative agency was considered. It grew out of a proceeding to incorporate a bank. The commissioner of finance refused the charter and the proposed incorporators appealed to the board of bank appeals. The board overruled and set aside the decision of the commissioner of finance and ordered him to grant the certificate of incorporation. The commissioner and an objecting bank then sought review. Under the relevant statute, "the applicant" may apply for review in such a case. The court construed this literally as an exclusive provision for review. This did not permit the agency concerned to seek review. Nor could the objecting bank appeal either. Even such a competitor was held to lack standing. The difficulty with the court's approach is that it, in effect, places the administrative decision favorable to an applicant in a conclusive position. If neither the commissioner nor a competitor has standing, who *can* have such decision reviewed in the courts?

Reviewable action.—A state decision comparable to the already-discussed federal cases on ripeness for review is *Houk* v. *Beckley,* 72 N. W. 2d 664 (Neb. 1955). It involved a proceeding for a cease and desist order before the State Railway Commission. The Commission overruled motions to dismiss the complaint and a motion for rehearing and reconsideration and ordered a hearing on the complaint, and the defendants appealed. The court held that the order overruling the motion for rehearing and reconsideration and ordering a hearing on the complaint was procedural and interlocutory in character and not reviewable. Says the court, in language paralleling that used in the federal cases, an order of the Commission is not reviewable unless and until it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of an administrative process. That was not true of a procedural and interlocutory order like that at issue.

Scope of review.—A statement of the general rules governing scope of review is contained in *Hornauer* v. *Division of Alco-*

holic Beverage Control, 123 A. 2d 574 (N. J. Super. 1956), a liquor license suspension case. Appellants' major contention was that the proofs failed to support the charges by a fair preponderance of the believable evidence. This is the standard which guides the Director in measuring the adequacy of proof to sustain guilt in disciplinary proceedings instituted against licensees. The reviewing court's approach to the record is from a different direction. Indeed, the court notes, the futility of projecting for appellate review contentions relating to the preponderance of the evidence given before administrative agencies has become so increasingly manifest that documented support for their rejection would appear superfluous. It is the substantial evidence rule that is now the generally accepted gauge, says the court.

The choice of accepting or rejecting the testimony of witnesses rests with the administrative agency. Where such choice is reasonably made, it is conclusive on appeal. The scope of appellate review does not possess such breadth as would permit a disturbance of the administrative finding unless the court is convinced that the evidence permits of no reasonable latitude of choice. The court canvasses the record, not to balance the persuasiveness of the evidence on one side as against the other, but in order to determine whether a reasonable mind might accept the evidence as adequate to support the conclusion and, if so, to sustain it.

According to the New Jersey court, the reason for this exercise of judicial restraint is that otherwise the agency would be reduced to the status of a mere conduit for the transmission of evidence to the courts. Quoting Justice Brennan while he was still on the State bench, the court declares, "We should be cautious in invoking the power at least when dealing, as here, with the fact finding of an experienced agency of demonstrated competence. * * * We should appreciate the undesirability of trying cases *de novo* from such an agency and of the value of having the agency assume a real responsibility for weighing and considering the facts in a field where it has considerable experience." *Id.* at 576.

The effect of the review provisions of the Missouri constitutional section governing judicial review on statutory review provisions is considered in *State* v. *Public Service Commission,* 291 S. W. 2d 95 (Mo. 1956). The constitutional provision does not, in the court's view, automatically invalidate all other provisions with regard to scope of review. On the contrary, the provision in the constitution, is a "minimum standard" for judicial review. In other words, irrespective of what scope of judicial review of administrative decisions was provided by existing or future statutes dealing with specific agencies, the scope of review would in any event be as broad as that minimum review provided for by the constitution. Any statute providing for a narrower scope of review is no longer effective because of the constitutional provision. But this does not mean that statutes providing for a broader scope of judicial review than that stated in the constitution may not be enacted by the legislature. This is true, says the court, of both existing and future statutes.

JURISDICTIONAL FACT.—*Powell* v. *Michigan Employment Security Com'n,* 75 N. W. 2d 874 (Mich. 1956), illustrates full review in a State court of a jurisdictional finding of the type which, under *NLRB* v. *Hearst Publications,* 322 U. S. 111 (1944), would be subject to only limited judicial scrutiny. At issue was the finding of a referee of the Michigan Employment Security Commission that a photograph negative retoucher, who did retouching at her home for the owner of a photograph studio for $1 for each negative, was an employee under the Michigan Employment Security Act. The court reversed, holding that the retoucher was an independent contractor, not an employee. Of particular interest is the fact that the correctness of the agency finding was reviewed on the court's independent judgment, the court using the common-law test of "control" to determine whether the employment relationship did really exist.

REVIEW OF RATE-MAKING.—*Railroad Commission* v. *Houston Natural Gas Co.,* 289 S. W. 2d 559 (Tex. 1956), contains a detailed review of the important rate-making cases, from *Munn* v. *Illinois,* 94 U. S. 113 (1877) to *FPC* v. *Hope Natural Gas Co.,* 320 U. S. 591 (1943). As the court sees it, the problem here is to give the capital invested in public utilities the attributes of property protected by constitutional due process in a situation where there is in fact generally no competition, no true barter and sale, and the business operates under governmental regulation. During the last three-quarters of a century the judicial effort to cast this problem in legal terms which will meet the test of confiscation under the federal due process clause has absorbed some of the best efforts of the great creative minds of our law. A few of these have been Justices Gray, Holmes, Hughes, Brandeis, Jackson, and Judge Learned Hand. The federal chain of cases from 1877 to 1943 was seen to reflect a basic shift in the content of the federal constitutional definition of the property rights of a public utility.

Perhaps the most persistently troublesome problem in the whole field of utility regulation, according to the court, is in determining the value of the capital upon which the return is to be calculated. Stated legally, this first problem is: Do the relevant statutes require that utility rates be based upon a property valuation such as land, trucks, tools, meters, typewriters, gas mains, etc.? Can they be based upon the Prudent Investment theory? The court holds that the Texas statutes require a physical property valuation rate base. The next question is: How is a property valuation determined? Professional economists, says the court, have never been able to work out a general theory of economic value which is not susceptible to attack and criticism. The vast quantity of legal writing on the judicial effort to evolve formulas for evaluating the property of utility companies would indicate that the courts may not have had much more success than the professional economists. After discussing the various theories articulated in federal cases (particularly actual cost, reproduction cost, and prudent investment), the court states that the effect of the already-

cited *Hope* case is that under federal due process a State is free to use whatever valuation principle it determines is best suited to its needs. Under its State's statutes, the court holds that "fair value" means "present value".

Referring to the peculiar problems involved in the field of natural gas regulation, the court declares, "The truth is that it is neither desirable nor practical to use the same valuation formula for all types of property used by a gas utility. The difference between valuing a two-year-old pick-up truck where there can be a ready sale on an easily available market and a fifteen-year-old gas main buried under a paved street is apparent. Replacement cost new less adjustment for age and condition may or may not be close to the sales value of a second-hand truck. Where a piece of property has a sale or market value apart from and unconnected with the utility rate being fixed, this would seem to be the best criteria. The gas main may have no salvage or sale value at all. It may have value only in its use in the sale of gas. Its value for that purpose depends entirely upon the rate. For lack of any other criteria we bracket the problem of fixing a value for the gas main as a reasonable balance between original cost less depreciation and replacement cost new less an adjustment for present age and condition." 289 S. W. 2d at 572.

In conclusion, the Texas court articulates a general complaint against the vagueness of statutes in this field. "It is to be regretted that the legislature has not been more specific. The difference between a court's legislating and a court's construing an ambiguous and vague statute is thin, indeed, and we would urge that the problem of determining the best accounting practices to be followed in evaluating a utility's property can be best determined through the use of legislation and not by the courts. * * * It is the duty of the legislature to declare the law and of the courts to apply it. For the legislature to enact such vague statutes that the attempt of the courts to apply them produces what might be labeled judicial legislation puts an undue strain upon our governmental system." *Id.* at 578.

That review in rate-making is far from a trial *de novo* is the thesis of *Public Service Commission* v. *Indianapolis,* 131 N. E. 2d 308 (Ind. 1956). In the court's view, "if the trial courts have the power to fix rates they 'will have little time for anything else, in view of the complicated questions of value and rates involved and the voluminous evidence proper in such hearings. Why have any Commission at all if this court is going to usurp its powers?' The 'substantial evidence' rule is the only reasonable rule for avoiding such a Serbonian bog." *Id.* at 312.

CHAIRMAN'S PAGE

This issue of the *Bulletin* contains the annual review of developments in the field of administrative law by Professor Bernard Schwartz, Editor of the *Bulletin*. This entire issue of the *Bulletin* has been personally prepared by Professor Schwartz and the views expressed herein are, of course, his views and not the views of the Section or of the American Bar Association.

Because of the length of this issue, it has not been feasible to include the contemplated review of recent Section activity, of current legislation, of changes in membership and other matters which will necessarily be included in the next issue of the *Bulletin* to be published shortly.

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